

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

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In the Matter of CLAUDE NELSON STUART, an
Attorney and Counselor-at-law

GRIEVANCE COMMITTEE FOR THE SECOND AND
ELEVENTH JUDICIAL DISTRICTS,

Petitioner,
-against-

CLAUDE NELSON STUART,

Respondent
-----X

Petition No. 2003-0401

DISCIPLINARY HEARING
335 Adams Street
Brooklyn, New York
August 9, 2004

B E F O R E:

HONORABLE JOHN P. CLARKE,

SPECIAL REFEREE

A P P E A R A N C E S:

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BY: MELISSA D. BRODER, ESQ.
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ELLEN DOHERTY NERI, CSR, RPR, CRR
PRINCIPAL COURT REPORTER

1 SPECIAL REFEREE: Are we ready?

2 MS. BRODER: Yes.

3 Good morning, your Honor.

4 I will begin by introducing documentation into
5 the record, as part of the Petitioner's case.

6 MR. KARP: Do you want to note the appearances
7 for the record, please.

8 MS. BRODER: Sure.

9 Melissa Broder, assistant counsel for the
10 grievance committee.

11 MR. KARP: Jerome Karp, 26 Court Street, counsel
12 for the respondent.

13 THE RESPONDENT: Claude Stewart, respondent.

14 SPECIAL REFEREE: Okay. Thank you.

15 MS. BRODER: At this time, I would introduce, as
16 Petitioner's Exhibit 1 in evidence, the investigative
17 appearance transcript under oath of Claude N. Stuart.

18 MR. KARP: No objection.

19 I believe you gave a copy to me previously.

20 MS. BRODER: Thank you, Judge.

21 This will be Petitioner's Exhibit 1 in evidence.

22 (Transcript of September 16, 2003 so marked as
23 Petitioner's Exhibit 1 in evidence.)

24 MS. BRODER: Petitioner would introduce as
25 Petitioner's 2 in evidence a document that was previously

1 marked as Committee's Exhibit 1 for identification at the
2 examination under oath, being a sua sponte letter
3 commencing the investigation, which was an exhibit.

4 MR. KARP: I have no objection, but wouldn't that
5 be part of the record of your Q & A?

6 MS. BRODER: All documents that were identified,
7 but I would choose to mark them all as separate exhibits,
8 so that they can be referred to.

9 MR. KARP: That's the sua sponte letter?

10 MS. BRODER: Yes.

11 MR. KARP: No objection.

12 MS. BRODER: Just for ease of reference.

13 (Sua sponte letter so marked as Petitioner's 2 in
14 evidence.)

15 MS. BRODER: At this time the petitioner would
16 submit, as Petitioner's Exhibit 3 in evidence, what was
17 previously marked as Committee's Exhibit Number 2, Mr.
18 Stuart's answer to the investigation.

19 MR. KARP: No objection.

20 (Respondent's answer dated 1/30/03 so marked as
21 Petitioner's 3 in evidence.)

22 MS. BRODER: The petitioner moves to introduce,
23 as Petitioner's Exhibit 4 in evidence, what was previously
24 marked as Committee's Exhibit 3 for identification, the
25 DD-5 or police interview report of a Shanese Knight.

1 MR. KARP: No, no objection.

2 (DD-5 so marked as Petitioner's Exhibit 4 in
3 evidence.)

4 MS. BRODER: At this time, the petitioner
5 submits, as Petitioner's Exhibit 5 in evidence, what was
6 previously marked as Committee's Exhibit 4 for
7 identification, the excerpts of the People of the State of
8 New York against Tyrone Johnson, regarding the colloquy
9 that took place between Mr. Stuart and Judge Rios.

10 MR. KARP: No objection.

11 MS. BRODER: Also, I just want to make it clear
12 for the record, I don't know if I submitted that on
13 Exhibit 1 in evidence the date of the investigative
14 appearance, September 16, 2003.

15 MR. KARP: Do you have the dates of those, of the
16 transcripts, when they occurred?

17 SPECIAL REFEREE: Yes.

18 MS. BRODER: The dates are referenced on the
19 cover page, and they were all provided to you after the
20 investigative appearance.

21 MR. KARP: Just wanted to mention it for the
22 record.

23 MS. BRODER: I'll read them in if you would like.
24 (Hanging).

25 MS. BRODER: Well, the cover page states:

1 May 7, 8, 9, 14, 15 and 16th, 2002, but the actual
2 references much Mr. Stuart and Judge Rios are from May 8th,
3 and June 4th of 2002.

4 MR. KARP: Thank you.

5 (Transcript excerpts from 5/8/02 and 6/4/02 so
6 marked Petitioner's 5 in evidence.)

7 MS. BRODER: At this time the petitioner has no
8 additional documents to submit. And the petitioner rests,
9 but will reserve the right to put on a rebuttal case.

10 SPECIAL REFEREE: Okay.

11 Mr. Karp?

12 MR. KARP: Yes.

13 Mr. Clark, at the outset, I have four character
14 witnesses sitting outside, and I would like to take them
15 out of turn, so they could go about their business.

16 One is another is a member of the cloth and
17 another one is a law secretary to the supervising judge in
18 Queens.

19 (Discussion with Respondent.)

20 MR. KARP: (Cont'g) There are three, and the
21 other is the respondent's wife.

22 I intend, with your permission, to call her as a
23 character witness. Also ask permission that she be
24 permitted to remain in the room after she testifies as a
25 character witness, because I think it's appropriate for a

1 person to have his spouse with him when he has a problem
2 such as this.

3 SPECIAL REFEREE: Do you have any objection?

4 MS. BRODER: Yes, I do.

5 Well, Number 1, as we're sitting here this
6 morning, this is the first time that Mr. Karp has provided
7 me with the names of any character witnesses that he
8 intends to call.

9 Number 2, as far as any character witnesses, I
10 want to make the record clear that I would object to any
11 testimony that does not conform to traditional character
12 witness testimony: Their reputation in the community for
13 truthfulness and veracity, and that excludes whatever their
14 personal opinion and personal dealings with Mr. Stuart
15 would be.

16 Now, in the case of Mr. Stuart's wife, she does
17 not fall within the definition of a character witness in a
18 proceeding.

19 She wouldn't be testifying to his reputation for
20 truth and veracity in the community. I suggest that that
21 she would be testifying about their personal relationship,
22 which Mr. Stuart is freely capable of testifying about his
23 personal information, his family, whatever mitigation he so
24 chooses, but she is not a character witness.

25 And I would object not only to her testimony, but

1 this is a confidential proceeding. And it's my position
2 that you would have to make an application to the Appellate
3 Division to have Ms. Stuart sit in.

4 It's a highly irregular, unusual request. And
5 it's inappropriate for a proceeding concerning a lawyer's
6 conduct to have a spouse and a lay person sit in this
7 proceeding.

8 SPECIAL REFEREE: Mr. Karp.

9 MR. KARP: I just want to indicate I couldn't
10 disagree more strenuously with Ms. Broder. To begin with,
11 I don't think the fact that there is a marriage license or
12 vows between a man and woman, that would preclude the
13 witness the spouse from being a character witness.

14 And I suggest that I have abundant faith in the
15 referee to be able to determine from the testimony what is
16 a personal opinion and exclude it, and what is reputation.

17 I suggest that a wife is probably, maybe in the
18 best position of any witness that I can think of to testify
19 to the reputation of her husband, because she not only sees
20 him in the neighborhood, but she sees him in his church,
21 she sees him in his practice, she sees him in any number of
22 communities that we're talking about.

23 Character testimony is not limited to a
24 community; it's any community that can speak. And if she
25 meets the other requirements of a character witness, I

1 think there's nothing wrong with that.

2 And I think by all means she should be able to
3 testify. And I've done it before, perhaps not here.

4 However, with respect to the second part of it,
5 I'm a little surprised that Ms. Broder has made this an
6 issue. I have never raised an issue as to an intern
7 sitting in on a hearing, a Q & A or a trial, never.

8 And I'm a little surprised there is no intern
9 here today, because that's how they learn.

10 Perhaps in the future that's what I have to do,
11 insist that they go to the Appellate Division and get
12 special permission to sit here. But I can't see doing
13 that, because I just think it's a waste of time. An intern
14 is a person who is going to be a lawyer, or is a lawyer.
15 Why not?

16 It happens that Ms. Mrs. Stuart is an accountant,
17 professional person, educated. She will not cause any
18 problem here such as an outburst or something we are
19 fearful of.

20 We discussed it, and I told her I would ask the
21 referee to ask permission to sit here after she testified.

22 And I submit I don't think there's anything --
23 the privacy is for my protection, not for the protection of
24 Ms. Broder.

25 If I waive the privacy to that extent, I think

1 you should do it.

2 SPECIAL REFEREE: As far as hearing her
3 testimony, I think that I am inclined to hear it, and judge
4 accordingly.

5 The question of her remaining is an interesting
6 one, one certainly that I've never come across.

7 And I think you make a good point, Mr. Karp,
8 about the fact that the confidentiality can be waived.

9 So I think -- well, let me mull that over, and
10 after she's testified I'll make a decision on it.

11 MS. BRODER: I do want to note that there is
12 quite a distinction between a law intern who is here in the
13 course of business being in the room, versus a lay witness.

14 And when, again, whenever anyone waives the
15 confidentiality, it's always made through, my
16 understanding, is that if someone wants an open public
17 hearing, they have made that motion to the Appellate
18 Division.

19 SPECIAL REFEREE: Well, I agree that the intern
20 is a different story, but, again, it's a novel question for
21 me, I'll have to think about it a little bit, but I will
22 allow the testimony.

23 MR. KARP: You've concluded with your part of the
24 case?

25 MS. BRODER: Yes.

1 SPECIAL REFEREE: She's rested.

2 MR. KARP: I would call, with your permission, I
3 would call Mrs. Stuart, because she can be my first
4 character witnesses.

5 And I intend to call all the character witnesses
6 right away so they can go about their business.

7 SPECIAL REFEREE: I have a feeling that perhaps
8 that might be stretching it.

9 You don't have any objection to them coming out
10 of order, I take it?

11 MS. BRODER: No.

12 SPECIAL REFEREE: No, let's hear your other
13 character witnesses first, and then --

14 MR. KARP: Before Mrs. Stuart?

15 SPECIAL REFEREE: Yes.

16 Then I'll decide whether or not she can remain,
17 then, after she's testified.

18 MR. KARP: Okay.

19 Then with your permission I'll go and bring one
20 of them in anyway.

21 (Pause).

22 MR. KARP: Reverend, would you go up to that
23 chair and remain standing.

24 REV. G L Y G E R B E A C H, called as a witness, having
25 been first duly sworn, was examined and testified as

1 follows:

2 THE WITNESS: G-L-Y-G-E-R, B-E-A-C-H, 6958 East
3 32nd Street, Brooklyn, 11210.

4 DIRECT EXAMINATION

5 BY MR. KARP:

6 Q Reverend Beach, you are a member -- you are a
7 clergyman; is that correct?

8 A That's correct.

9 Q And could you tell us a little bit of your educational
10 background?

11 A Where do you want me to begin?

12 Q Begin from college.

13 A Associate of Arts, Bachelor of Arts degree in
14 Behavioral Science; Master of Arts; Master of Divinity; Doctor
15 of Ministry; and Doctor of Theology is current degrees.

16 Q From which universities?

17 A Started from Long Morris College in Texas; Scarritt
18 S-C-A-R-R-I-T-T College in Nashville, Tennessee, that's where I
19 got the BA and MA.

20 Drew University, M. Div., Doctor of Ministry
21 degree, and California Graduate School of Theology.

22 Q Reverend, what is your present position?

23 A I'm the senior pastor of Vandever Park United
24 Methodist Church in East Flatbush.

25 Q And how long have you been practicing the ministry?

1 A Ordained, and full-time, since 1978.

2 Q And do you know Mr. Stuart, who is seated alongside of
3 me?

4 A Yes, I do.

5 Q And how long have you known him?

6 A About over 20 years now. I knew him when he wasn't
7 even in law school.

8 Q Can you tell us how you made his acquaintance?

9 A I was his pastor at -- in St. Albans, Queens.

10 Q And have you maintained a continuous relationship with
11 him since that time?

12 A Yes.

13 Q And do you know the people who know him?

14 A Yes.

15 Q And are you familiar with his reputation for honesty
16 and decency and hard work?

17 A That's correct, yes.

18 Q And what is his reputation for those attributes?

19 A Excellent.

20 Q Now, the matter, the underlying matter that brings us
21 here today drew some media attention; are you aware of that?

22 A Yes, I am.

23 Q And as a result of that media attention and the
24 knowledge of people of what the accusations were against
25 Mr. Stuart, did you speak to others?

1 A Oh, many, many, many folks.

2 Q And has the reputation that he had, that you've
3 indicated, changed any, by reason of the fact that people know
4 about these -- the accusations made against him?

5 A Well, I think if it really made any change in the
6 number of persons I've spoken to, is more giving empathy on his
7 part, because of his integrity the people who know him say this
8 is more of a setup. This is politics. Those are the
9 statements people make, because of his decency, the way in
10 which he has helped people, his impact, the way people know
11 him, he's still the same kind of person.

12 Q I see.

13 Thank you.

14 MR. KARP: I have no further questions.

15 THE RESPONDENT: Just one moment.

16 May I?

17 (Discussion with attorney.)

18 MR. KARP: One further question.

19 Q Are you a member of the military, Reverend?

20 A Yes.

21 Q And is Mr. Stuart to your knowledge a member of the
22 military?

23 A Yes.

24 Q And are you his chaplain in the military?

25 A I had been his chaplain for a number of years, about

1 at least four years.

2 MR. KARP: Thank you.

3 SPECIAL REFEREE: Ms. Broder.

4 CROSS-EXAMINATION

5 BY MS. BRODER:

6 Q Good morning, Reverend.

7 A Good morning.

8 Q I just have one or two questions for you.

9 You said that it's basically the general
10 consensus, amongst the people who you've discussed Mr. Stuart's
11 reputation with, that the incidents that we're here for today
12 is as a result of a setup; is that correct?

13 A That's how some people felt. I served in Queens,
14 where I was his pastor.

15 Q Yes?

16 A And, you know, the district attorneys were elected
17 officials.

18 In fact, we had to -- and I was at the
19 table -- where we ask for more ethnic persons from the
20 community to become assistant district attorneys. There was
21 almost nil.

22 So it was really almost high politics. So when
23 some person -- you would hear 'all of the ethnic minorities are
24 moving out,' now really trying to get rid of them, whether its
25 through reputation or some other means.

1 So the community as a whole began to see it as an
2 attack on the integrity of those who can serve, because they
3 are part of that community.

4 Q And based on your knowledge of Mr. Stuart and your
5 experience, this was the only incident you had ever heard of
6 regarding any misconduct on his behalf in his profession as a
7 lawyer?

8 A Sure, exactly so, yes. Only time I've ever heard of
9 anything of that nature.

10 Q Would it surprise you if you learned that he had
11 engaged in advocating a false position to the Court before?

12 MR. KARP: Objected to. I'd like an offer of
13 proof.

14 MS. BRODER: I am going to mark as Petitioner's
15 Exhibit 1 for identification, the People of the State of
16 New York versus Jay Walters.

17 MR. KARP: One or six?

18 MS. BRODER: This is an Exhibit 6 for
19 identification.

20 I'll mark it as People's Exhibit 6 in evidence.

21 MR. KARP: Six for identification would be
22 appropriate.

23 But it's up to you.

24 MS. BRODER: I'll mark it into evidence.

25 SPECIAL REFEREE: Why don't you let him look at

1 it.

2 (Hanging).

3 MR. KARP: Decision of the Court, is that the
4 Supreme Court?

5 MS. BRODER: Appellate Division.

6 MR. KARP: I would object to the introduction of
7 this exhibit in either event, because the question posed to
8 the witness was if he -- would it surprise you to hear
9 that, such and such.

10 I would ask for an offer of proof, which I have
11 seen, so he can answer that question: "Are you surprised
12 by it."

13 SPECIAL REFEREE: No, I'll admit it.

14 But, you can ask the question based on it.

15 (Appellate Division decision so marked
16 Petitioner's 6 in evidence.)

17 Q Reverend, I asked you would it surprise you to learn
18 that Mr. Stuart had been determined to have given false --
19 advocated a false position to the Court before, before this
20 instance.

21 Would that surprise you?

22 A I guess so, I guess yes.

23 Q So you didn't know about that as you sit here today?

24 A Before?

25 Q You didn't know that Mr. Stuart had previously been

1 found by the Appellate Division to have engaged in
2 prosecutorial misconduct?

3 A With -- you mean prior to here?

4 Q Outside of the instance of why we're sitting here
5 today.

6 I'll clarify.

7 A Okay.

8 Q Did you know that in 1998 the Appellate Division
9 determined that Mr. Stuart engaged in prosecutorial misconduct?

10 A No, I had not seen that in print, no.

11 Q And you weren't advised about that from Mr. Stuart,
12 were you?

13 A No, I had heard about an allegation, but not of any
14 ruling.

15 Q What allegation had you heard of?

16 A In what you're talking about here, that, you know, it
17 was alleged that he gave wrong information to a judge.

18 Q And did that affect your opinion on his reputation?
19 Did that affect your opinion about his veracity and
20 truthfulness?

21 A Well, the way I understood, and the explanation of
22 that, to me, you know, I was fully content that, I mean, his
23 reputation is intact, to me, you know.

24 Q So you were content?

25 A I don't think -- the way I understood it it was not

1 his intention to go and, I mean, to intentionally give false
2 information to a judge.

3 So that's the way I understood it.

4 Q What was the matter that you understood this about;
5 which case are we talking about?

6 A I'm not -- I think the way I remembered it, it was a
7 murder case, perhaps. I think it was; I'm not sure it was.

8 Q But you never heard of the case of the People versus
9 Jay Walters, did you?

10 A I'm not sure if that was the case.

11 Q Nevertheless --

12 A Something that happened in the Queens community, and,
13 you know.

14 Q Were you aware that Mr. Stuart was found to have
15 advocated a false position to the Court?

16 A A finding?

17 Q Yes, a finding by the Appellate Division of the State
18 of New York.

19 A No.

20 MS. BRODER: All right.

21 A I knew -- I was aware that he was accused, and this
22 was some of the things, but, no, not that he was found.

23 Q And did you think that that was a setup as well?

24 A I don't really understand the court system very much.

25 But I could understand where a judge says, well,

1 what you said to me, you know, I do not regard it as the truth.

2 And the way I understood it, the situation I
3 remembered, conversation with other persons about, and even
4 those who were attorneys, was a matter of, the question was
5 basically did this person, did you interview this person,
6 etcetera, and the answer was no.

7 That's what I heard, but I never followed up and
8 read anything in particular about that.

9 Q Well, would it surprise you that what I'm talking
10 about has nothing to do with an interview of a person but,
11 rather, arguing about evidence to a jury, and arguing a false
12 position to a jury?

13 Do you know anything about that?

14 MR. KARP: Mr. Clark, I have to object to it
15 because I think the witness is confused as to which case
16 Ms. Broder is referring to.

17 MS. BRODER: That's all right.

18 The Reverend has simply argued that it was a
19 murder case that he's thinking of, and that it was an
20 interview of a witness.

21 I'm telling you, Reverend, I'm referring to an
22 entirely separate matter.

23 So are you familiar with any other matter.

24 A No.

25 And the other matter as far as affecting his

1 reputation in the community in any negative way.

2 MS. BRODER: Thank you.

3 No further questions.

4 SPECIAL REFEREE: Thank you very much.

5 MR. KARP: Thank you, Reverend.

6 May I, please.

7 SPECIAL REFEREE: Yes.

8 Thank you.

9 (Witness withdrew).

10 MS. BRODER: May I step out.

11 SPECIAL REFEREE: Sure.

12 (Pause in proceedings).

13 L E O N A R D L I V O T E, called as a witness, having
14 been first duly sworn, was examined and testified as
15 follows:

16 THE WITNESS: Leonard L-I-V-O-T-E, 248-24
17 Thornhill Avenue, Douglaston, New York, 11362.

18 MR. KARP: May I.

19 SPECIAL REFEREE: Please.

20 DIRECT EXAMINATION

21 BY MR. KARP:

22 Q Mr. Livote, what is your business or profession?

23 A I'm an attorney.

24 Q And what is your occupation?

25 A I work as the law secretary or principal law clerk to

1 the Administrative Judge, Leslie Leach, of Queens County.

2 Q And how long have you been practicing or been admitted
3 to practice?

4 A Since 1979.

5 Q And do you know Mr. Stuart, who is seated alongside of
6 me?

7 A Yes, I do, for many years.

8 Q And do other people know him?

9 A Yes, I do.

10 Q And are you familiar with his testimony for truth and
11 veracity and hard work?

12 A Yes.

13 Q What is his reputation for those attributes?

14 A Outstanding.

15 I know Claude in the military; I am a colonel in
16 the United States Army Reserve.

17 Claude and I have -- careers have followed each
18 other.

19 He is a major in the army reserve.

20 Both work together in the JAG Corps. I know his
21 reputation as being outstanding in the JAG Corps. as well as in
22 the civilian law community.

23 MR. KARP: I have no further questions.

24 CROSS-EXAMINATION

25 BY MS. BRODER:

1 Q Mr. Livote, is it?

2 A Yes.

3 Q Now, you said you are familiar with his reputation in
4 the practice of law?

5 A Yes, I am.

6 Q How are you familiar with his reputation?

7 A Well, I practiced law in Queens most of my career. I
8 was an Assistant District Attorney in Queens. I was in the --

9 Q What year were you an assistant there?

10 A From 1982 through 1987.

11 Q So that was prior to Mr. Stuart's working there,
12 correct?

13 A I believe, I don't know the exact start date but I'm
14 not sure if we overlapped, yeah, but I do know that he rose to
15 a very prestigious trial position there, doing very serious
16 cases, and had very good reputation.

17 Also, you know, being in the kind of Queens legal
18 community, we know what our colleagues were doing.

19 Q Were you also aware of the fact that he had been found
20 to have engaged in prosecutorial misconduct before?

21 A I don't know if he was actually found to be.

22 I know there was a prior incident.

23 I don't know if it had been raised to the level
24 of a finding.

25 Q Would it surprise you if I told you that an Appellate

1 Division reversed a conviction that Mr. Stuart had obtained,
2 based on his prosecutorial misconduct?

3 A Are you talking about this particular?

4 Q No.

5 A I knew that there was a prior incident. It wouldn't
6 affect my opinion of him.

7 Q Okay.

8 MS. BRODER: I have no further questions.

9 SPECIAL REFEREE: Mr. Karp?

10 MR. KARP: Thank you, no.

11 SPECIAL REFEREE: Just for the record, I would
12 like to note that I'm familiar with the witness, having met
13 him before and dealt with him before, know his reputation
14 as well.

15 THE WITNESS: Thank you, sir.

16 (Witness withdrew).

17 SPECIAL REFEREE: He was law secretary to a
18 colleague of mine who taught for many years, Judge Schmidt.
19 REV. J U D I T H A. M I L L S, called as a witness,
20 having been first duly sworn, was examined and testified as
21 follows:

22 THE WITNESS: Reverend Judith A Mills, M-I-L-L-S,
23 18 R-E-T-T-A Lane, Commack, New York, 11725.

24 DIRECT EXAMINATION

25 BY MR. KARP:

1 Q Reverend Mills.

2 A Yes.

3 Q What is your present position?

4 A I am the pastor at the Dix Hills United Methodist
5 Church.

6 Q And you went through the regular training in college
7 and divinity school to taken the position that you have; is
8 that correct?

9 A Yes, went through.

10 Q How long have you been practicing as a minister?

11 A 26 years.

12 Q And do you --

13 A Practicing doing that, during training.

14 Q Do you know Mr. Stuart, who sits alongside of me?

15 A Oh, sure.

16 Q How long have you known him?

17 A Since July 1st, 2001.

18 Q And how did you first make his acquaintance?

19 A Becoming his pastor.

20 Q I see.

21 So he's a member of your congregation?

22 A Yes, he is.

23 That is when I was appointed to the church.

24 Q And are you familiar with his reputation for honesty
25 decency and forthrightness?

1 A Yes.

2 Q And what is his reputation for those attributes?

3 A Highly respected.

4 Q Is his reputation a good reputation?

5 A Yes, very good.

6 MR. KARP: I have no further questions.

7 CROSS-EXAMINATION

8 BY MS. BRODER:

9 Q Good morning, Reverend.

10 I just have one or two questions.

11 A Sure.

12 Q Are you familiar with his reputation as a lawyer?

13 A To a certain extent.

14 I mean, I haven't been in the courtroom with him,
15 that might be interesting, but I haven't been in court at all.

16 Yes, we have three other lawyers in our
17 congregation: Gerald Washington and Joe Washington and William
18 Forde, and Claude also.

19 And so, the lawyers kind of talk to each other,
20 and the pastor gets in on some of that conversation and
21 listening to them.

22 So, you know, just holding high regard for
23 Claude. I know that. They have personally talked to him.

24 Q And are you personally familiar with, you said that he
25 has a good reputation for honesty?

1 A Yes.

2 Q And integrity and hard working.

3 Would that change your opinion if you knew that
4 he had been found to have engaged in prosecutorial misconduct
5 before?

6 A No, I didn't realize that before, but I know Claude
7 -- well, Claude is also a trustee of the church.

8 And he was elected in 2001, to be able to take
9 over in 2002 a position that was a one-year position, trustee
10 in the arm of this church is three years, to fill in this void
11 that was -- a person had resigned from that.

12 And in November 2002 he was reelected for the new
13 term and still is -- his term is until 2005 and so, that's
14 just, that form of a trustee is a very important position. It
15 concerns any invested funds, as well as concern for the real
16 property. Two major jobs on that.

17 Q But you testified that you weren't aware of this
18 previous finding of prosecutorial misconduct?

19 A It was before my time.

20 MS. BRODER: All right. I have no further
21 questions.

22 SPECIAL REFEREE: Thank you very much.

23 MR. KARP: Thank you.

24 THE WITNESS: Okay.

25 I forgot to tell about what he did with the

Diederich - Direct

organ. He's a guest organist. He is a guest organist for us in the summertime, and plays for the junior choir, accompanies them.

SPECIAL REFEREE: Very good.

MR. KARP: I can only play the radio.

Thank you.

THE WITNESS: Thank you very much.

(Witness withdrew.)

MR. KARP: I'll go out and bring in the next

witness.

M I C H A E L D I E D E R I C H, called as a witness, having been first duly sworn, was examined and testified as follows:

THE WITNESS: Michael D-I-E-D-E-R-I-C-H, 361

Route 210, Stony Point, New York, 10980.

DIRECT EXAMINATION

BY MR. KARP:

Q Mr. Diederich, what is your business or profession?

A I'm in the private practice of law --

Q (Int'g) And how long have you been -- sorry.

A (Cont'g) -- in Stony Point, New York.

I practice principally Employment Law, Civil

Rights Law.

And I've been a lawyer admitted in New York

courts since 1981.

EDN

1 I'm admitted in the Southern District, Second
2 Circuit Court of Appeals, U.S. Supreme Court, Army Court of
3 Military Review, Eastern District.

4 Q And I take it from what you just said that you are a
5 member of the military; is that correct?

6 A That's true.

7 I served three years active duty with U.S. Army
8 in Europe with the first armored division, where I was a
9 lawyer.

10 After that, I was an assistant county attorney in
11 Westchester County, then an assistant county attorney for
12 environmental law for Rockland county, and where I now have my
13 private practice.

14 Q Are you still a member of the military service?

15 A Yes.

16 I'm a lieutenant colonel in the Army JAG Corps.
17 Reserve.

18 And actually our unit has been ordered mobilized,
19 so I'll probably be going off to Iraq in a month or so,
20 probably for a year.

21 Q And is Mr. Stuart, who is seated alongside of me, a
22 member of your unit?

23 A He was a member of my unit. I was assigned to be the
24 command judge advocate of the 301 area support group.

25 When I arrived there, Mr. Stuart was the deputy

1 command judge advocate. So I worked with him there as my
2 subordinate for approximately two years, where he basically he
3 had been there for quite a while.

4 So the shop was running, you know, very well.
5 And he continued to assist me in keeping running well.

6 Q And how long have you known him?

7 A I've known him since, actually a little bit before I
8 became the command judge advocate in the 301st, when I received
9 word that I was going to be the command judge advocate there, I
10 inquired about personnel.

11 So I talked with various other JAG people.
12 "JAG" is Judge Advocate General, the lawyers for the Army.

13 So I spoke with various people about who were the
14 staff there, and they told me Claude was one. And everybody
15 that I talked to had positive things to say about Claude.

16 Q When was that, that you became the commander?

17 A I became the command judge advocate there, acting
18 command judge advocate, and then actually I was only formally
19 designated due to some administrative things in headquarters,
20 because what happens in the JAG Corps., you have to be
21 appointed by the person called the "judge advocate general,"
22 who is the two-star general who heads the Army JAG Corps. in
23 Washington.

24 So, he formally appointed me
25 about a year-and-a-half ago, just as, by the way the two star

1 pointed Claude to be the command judge. He is now the command
2 judge advocate of the 800 Medical Brigade, so the two-star
3 general had to formally designate him for that commanding role
4 as a lawyer.

5 Q So you know him a total of, what, two years?

6 A No, I would say probably from 2000.

7 Q Four years?

8 And do you know other people who know him, I take
9 it?

10 A Yeah. Our JAG community is, you know, a number of
11 lawyers here in the New York Metropolitan area from, you know,
12 all walks of life.

13 They're governmental attorneys, and private
14 attorneys; some of them military people, solely military. But
15 most are reservists.

16 And we all talk. And people learn who has a good
17 reputation.

18 Most JAGs have good reputation, in my opinion.

19 Q Do you know what his reputation is for honesty and
20 decency and hard work?

21 A It's an extremely good reputation. Otherwise, he
22 wouldn't be a command judge advocate. That's a highly
23 competitive thing to be selected for, and it shows both your
24 diligence -- you have to, part of your tasks are, principal
25 part is advising the command on military legal issues that

1 arise in the command so you have to get the respect of both
2 your civilian commander, and also give good legal advice.

3 And Claude has a -- I've never heard anything bad
4 about Claude. I've always heard good things, and those are
5 from people that are, that know him in Queens County. I don't
6 practice much in Queens County, but I know plenty of JAGs who
7 do.

8 And if people get in trouble or, I shouldn't say
9 trouble, but if they're not hard workers, you would hear about
10 that.

11 And Claude, both from my personal observation, he
12 would go in countless -- I mean, because he lives in Queens, he
13 came in for my office, representing my office routinely for
14 evening meetings, which he didn't have to do which was
15 basically didn't get paid anything extra for doing that.

16 He did that, you know, for the unit, and helped
17 me out.

18 And I just have nothing but the best regard for
19 him.

20 Q Thank you.

21 A Both as a military person, officer, and as a lawyer
22 for the army.

23 MR. KARP: Thank you.

24 CROSS-EXAMINATION

25 BY MS. BRODER:

1 Q Mr. Diederich, I was curious, in your position as a,
2 is it JAG supervisor?

3 A Yeah, a JAG officer.

4 Q I mean do you have -- about how many attorneys that
5 work under you?

6 A Well, it's within our unit, we have had three or four,
7 on average. There's, in the reserves you're double-slotted.
8 Often you have more than you're actually assigned. When we go
9 away to Iraq, we'll have two.

10 Q If one of the attorneys that were working under you,
11 you learned that they advocated a false position in a court
12 proceeding, would that affect your opinion about their
13 truthfulness and honesty?

14 A Well, advocate a false position? I would think I need
15 more details.

16 I'm very, let me tell you, I'm very sensitive to
17 governmental misconduct. A lot, in my private practice a lot
18 of the entities I challenge are governments where government
19 officials are doing misdeeds.

20 I also, I mean, I grabbed it on my way out. I
21 also ran for D.A. in my county (handing). I don't know if
22 anybody would like this. Part of the reason I ran for
23 D.A. -- and I'm not running for Queens so nobody has to
24 worry -- part of the reason I ran is because I saw people in
25 the D.A.'s office, including the D.A. doing things which I

1 thought were improper.

2 And I don't have -- I think that's wrong. But I
3 also have seen that it's something that is a problem amongst
4 D.A.'s, in a lot of places.

5 Q Are you familiar with the fact that Mr. Stuart has
6 been found in the past by the Appellate Division to have
7 engaged in prosecutorial misconduct?

8 A You know, when you say fact, I would like, if you told
9 me what the actual facts established were.

10 Q Well, if one of the facts were that Mr. Stuart argued
11 that a gun used in an attempted murder was -- or a gun found on
12 a witness was connected to an attempted murder, and that he
13 knew that was not the truthful position but argued it anyway,
14 did you know that?

15 A I was vaguely familiar with a -- that there was a
16 statement from an appellate court. I know from my legal
17 experience, the difference between what judges may write and
18 what is actual fact, you know, sometimes.

19 Q Do you think that the Appellate Division would
20 overturn a conviction lightly?

21 A The standard applied in an appellate court -- I'm not
22 a criminal law practitioner, but the standard applied is, it's
23 not on trial, it seems to me.

24 Anything other than whether or not a defendant is
25 guilty beyond a reasonable doubt or whether there's been other

1 sorts of irregularities, constitutional irregularities that
2 warrant reversal and a retrial, that type of thing. I mean,
3 normally courts address issues presented to them.

4 Q Well, my question, really, to you is: Were you
5 familiar with the fact that there was this finding?

6 A I haven't seen the decision, but Claude and I have
7 discussed in the past ethical dilemmas faced by attorneys,
8 including prosecutorial attorneys.

9 In fact we discussed it because he knew and we
10 discussed one of the reasons I was running for public office as
11 District Attorney candidate was because of what I saw as
12 problems with prosecutors going over the bounds.

13 MS. BRODER: All right. I have no further
14 questions.

15 SPECIAL REFEREE: Thank you very much.

16 MR. KARP: Thank you.

17 (Witness withdrew.)

18 M O R T I M E R L A W R E N C E, called
19 as a witness, having been affirmed under penalties of
20 perjury, was examined and testified as follows:

21 THE WITNESS: Mortimer Lawrence, 186-17 Merrick
22 Boulevard, Springfield Gardens, New York.

23 DIRECT EXAMINATION

24 BY MR. KARP:

25 Q Mr. Lawrence, what is your position or profession?

1 A I'm an attorney.

2 Q And how long -- are you admitted to practice in the
3 State of New York?

4 A Yes, I am.

5 Q And how long have you been admitted to practice here?

6 A 18 years.

7 Q And tell us, just briefly, what your career was after
8 you left law school?

9 A I was in a firm in Queens, small firm in Queens, for
10 about a year before entering the Queens District Attorney's
11 office, where I served in the criminal courts, the trial bureau
12 and homicide investigation.

13 Thereafter I went to work with a firm in Long
14 Island for about three years, doing mostly criminal practice
15 before going into private practice myself, where I've been for
16 approximately for the last 12 years.

17 Q So you have your own firm, is that it?

18 A Yes, I'm a partner in the firm of Hopkins, Lawrence
19 and Bailey, in Queens, New York.

20 Q And do you continue to do criminal work in your
21 practice?

22 A Yes, I do.

23 Q And do you know Mr. Stuart who is seated alongside of
24 me?

25 A Yes, I do, I know Mr. Stuart very well.

1 Q How long have you known Mr. Stuart?

2 A We were law school, classmates since 1982.

3 And we're also colleagues at the bar. We've
4 served in the bar association together. We're brothers of
5 faith. Claude and I have a good church affiliation. I go to
6 Allen, and he goes to Methodist, and we've done some work
7 together as trustees. And we're friends. Our families are
8 friends.

9 Q And do you know about the people who know him?

10 A Excuse me?

11 Q Do you know other people who know him?

12 A Oh, yes.

13 Q Are you familiar with his reputation for honesty and
14 decency and hard work?

15 A Yes.

16 Q What is his reputation for those attributes?

17 A Has a good reputation for honesty and decency,
18 fairness, faith, integrity and leadership.

19 Q Now, are you familiar with the charges, or just
20 roughly speaking, or briefly speaking, what the charges are
21 here in this case that bring you here?

22 A I know an outline of the charges.

23 Q And did this matter, at least the underlying case,
24 receive a good deal of media attention when it happened?

25 A Yes, it did.

1 Q And I assume, and correct me if I'm wrong, it evoked
2 comment and talk among people who either knew Mr. Stuart or
3 knew the system?

4 A Correct, very much so.

5 Q And his reputation that you've indicated, has that
6 been altered in any way by reason of the fact that people know
7 about this case?

8 A I would say for the most part, no. I think more shock
9 and surprise, more than anything else.

10 But he still has a great standing in the
11 community as a leader, and someone who has done a lot of work
12 in the community, so no.

13 Q Are you familiar with an incident that occurred in his
14 life about six years ago where the Appellate Division wrote an
15 opinion in the case reversing a conviction based upon
16 prosecutorial misconduct?

17 A Yes.

18 I was aware of that case, and it was started by a
19 Legal Aid attorney here in Queens who had lost a case to
20 Claude.

21 Having been in the District Attorney's office,
22 and also in private practice, the practice in Queens is very
23 adversarial, and the pressure in the D.A.'s office to win
24 homicide cases is intense.

25 But for the most part, you follow the lead of

1 your supervisor when these issues come up, and it's my opinion
2 that Claude pretty much did that.

3 MR. KARP: Thank you.

4 SPECIAL REFEREE: Ms. Broder.

5 CROSS-EXAMINATION

6 BY MS. BRODER:

7 Q Mr. Lawrence, what are you basing your opinion that he
8 followed the lead of his supervisor in the instance in which
9 the Appellate Division found that he had engaged in
10 prosecutorial misconduct?

11 A Having worked in that office, as I said, and also the
12 fact that I was in the homicide division.

13 I know there to be an unspoken pressure on
14 assistants to press the edges of discovery and evidence, and
15 just how far you can go, and what you say and you not say to a
16 jury.

17 Q As an attorney, even if the supervisor pressured you
18 to press the evidence, whose, in your opinion, as an attorney,
19 who bears the responsibility if they advocate a position that
20 they know is false to a court of law?

21 A Well, counsel, while clearly you are always the person
22 who is responsible for your conscience, and doing what is right
23 and wrong, I think by the very nature of the practice that we
24 do, there are not bright lines of when you get to the outskirts
25 of the practice. And so there are certain times when you are

1 pushing up right up against it and certain times when you're
2 not.

3 Q Hypothetically, if you knew, as a lawyer, that what
4 you were arguing to the jury was false, there is no blurred
5 line, you know it's false, you have a ballistic test that shows
6 you that a gun was not involved in a crime, yet you argue to
7 the jury that it was, is that conduct that's becoming an
8 attorney?

9 A Given your hypothetical I would say no, but clearly
10 there are factors that go into it.

11 See, in the D.A.'s office you are a lot of time
12 at the mercy of the police officers.

13 Q When you are arguing a case at the mercy of the
14 police?

15 A On how your case comes together.

16 And, you know, a lot of times you are relying on
17 statements that have been made to you either through the police
18 or through witnesses that sometimes don't turn out to be true.

19 Q All right.

20 MS. BRODER: I have no further questions.

21 THE WITNESS: Thank you.

22 SPECIAL REFEREE: Thank you very much.

23 MR. KARP: I think the only remaining witness
24 would be Mrs. Stuart's?

25 SPECIAL REFEREE: I've thought about her

1 testimony.

2 And, as I had said before, we'll hear her
3 testimony as a character witness.

4 I also although I said I knew of no precedent,
5 did remember, without objection, that a spouse did, was
6 allowed to continue in a hearing that I conducted in the
7 10th judicial district.

8 As I said that was without objection.

9 But, on balance, my feeling is that it would
10 probably be little harm involved.

11 As long as it's understood of course that once
12 she's finished her testimony, she does not participate.
13 She's going to sit by her husband's side.

14 MR. KARP: I think if that happens she should be
15 compelled to leave. I would agree.

16 SPECIAL REFEREE: So, we'll allow that.

17 MR. KARP: Thank you.

18 MS. BRODER: One question. This other person
19 that you just wrote on the list is that person testifying.

20 MR. KARP:

21 THE RESPONDENT: There's one more person that is
22 probably not present.

23 MR. KARP: I may get a letter or something.

24 M I C H E L L E S T U A R T, called as a witness,
25 having been first duly sworn, was examined and testified as

1 follows:

2 THE WITNESS: Michelle Stuart, Nine Burrows
3 Avenue, Dix Hills, New York 11746.

4 DIRECT EXAMINATION

5 BY MR. KARP:

6 Q Mrs. Stuart, you are the wife of Claude Stuart who is
7 seated alongside of me, correct?

8 A Yes, that's correct.

9 Q And how long have you been married?

10 A 16 years this past July.

11 Q And you have a family together?

12 A Uh-huh, yes, we do.

13 Q And do you have a business or profession that you are
14 engaged in?

15 A Yes. I'm an accountant. I work at the corporate
16 office of Foot Locker.

17 Q Foot Locker, the people that sell the sneakers and
18 stuff?

19 A Yes.

20 Q And how long have you been an accountant?

21 A Oh, dear, over 20 years now.

22 Q And, Mrs. Stuart, we know that you are married to
23 Mr. Stuart.

24 But I take it, and correct me if I'm wrong, that
25 you know other people who know him?

1 A Yes.

2 Q In your church?

3 A Yes.

4 Q In your community?

5 A Yes.

6 Q Members of the profession?

7 A Yes, yes.

8 Q And are you familiar with the reputation that your
9 husband enjoys for honesty, decency and hard work?

10 A Yes, with our friends, within the community, they know
11 him to be a hard-working person, an honest person, a caring and
12 loving father and husband.

13 Q And you are familiar with the circumstances that bring
14 you here in this case, I take it?

15 A Yes, I am.

16 Q Are you also familiar with another matter that goes
17 back about six years ago where the Appellate Division reversed
18 a conviction of a case tried by Claude as an assistant based
19 upon prosecutorial misconduct?

20 A Yes, I am.

21 MR. KARP: I have no other questions.

22 MS. BRODER: I have no questions.

23 SPECIAL REFEREE: Okay.

24 SPECIAL REFEREE: All right.

25 You are going to take the stand.

1 MS. BRODER: Can we take one quick break.

2 SPECIAL REFEREE: Sure.

3 (Recess taken.)

4 MS. BRODER: Thank you.

5 R E S P O N D E N T C L A U D E S T U A R T, called
6 as a witness, having been first duly sworn, was examined
7 and testified as follows:

8 THE WITNESS: Claude Stuart, Nine Burrows Avenue,
9 Dix Hills, New York, 11746.

10 DIRECT EXAMINATION

11 BY MR. KARP:

12 Q Mr. Stuart, how old are you?

13 A I am 43.

14 Tomorrow I will be 43.

15 MS. BRODER: You're 42.

16 Q And Mr. Stuart, you are an attorney; is that correct?

17 A That's correct.

18 Q When were you admitted?

19 A Let's see. I was admitted in 1990. No -- yes, in,
20 what's the exact date, is it January of 1990? I don't remember
21 the exact date.

22 Q The exact date we don't need.

23 The year would be sufficient.

24 January 18, 1989?

25 A 1989.

1 Q And could you tell us, just briefly, what your
2 educational background is, starting with college?

3 A I went to Ryder University in Lawrenceville, New
4 Jersey, and I majored in economics. I graduated with a
5 Bachelor of Science degree at Ryder.

6 Subsequent to graduating, I attended Seton Hall
7 University School of Law.

8 And in 1985, I graduated from Seton Hall
9 University School of Law with a juris doctorate.

10 Q And what did you do after '85?

11 You were admitted in '89.

12 A Yes, after '85, I had, I took the bar exam and I --
13 New Jersey bar exam at the time. I passed that. And I was,
14 had a job with the Honorable Justice Cocchia, C-O-C-C-H-I-A, as
15 her secretary. She was assigned to the criminal division:
16 Superior Court, criminal division.

17 I was there for one year; a clerkship in New
18 Jersey is only for a period of one year.

19 And subsequent to leaving there, I, for a short
20 while, I worked for Jacoby & Meyers, and then I went to work
21 for Nelson, Roche and Carter which is located in South Orange,
22 New Jersey.

23 After that I worked for maybe a year or two, I
24 then came to New York, and started working for the Queens
25 District Attorney's office; in either April -- April of 1988, I

1 began working at the Queens District Attorney's office.

2 Q But you weren't admitted in New York until '89?

3 A Yes. That year, I think also, that summer I also took
4 the bar that summer, also got married that summer.

5 And on passing the bar, that year, I was admitted
6 in the early part, as you indicated in 1989, in January of
7 1989.

8 Q Could you tell us briefly what your career in the
9 District Attorney's office entailed?

10 A I began working at the Queens District Attorney's
11 office, like I indicated, in April of '88. I was assigned to
12 the in-take bureau which, my duties entailed basically drafting
13 complaints; not going to court, just drafting complaints.

14 And upon being admitted, I was then allowed to go
15 to the arraignment part to do arraignments on misdemeanor and
16 some felony matters.

17 After leaving in-take bureau I then was
18 transferred to the Criminal Court Bureau, where I spent about
19 eight months in the Criminal Court Bureau.

20 And I was then transferred from there to an
21 investigative bureau, which is the Anti-bias Bureau at the
22 time. In the Anti-Bias Bureau we take the cases from in-take,
23 and go all the way up through either the Criminal Court or to
24 the Supreme Court with these cases.

25 So in the Anti-Bias Bureau I had the opportunity

1 to not only draft complaints, but also conduct investigations
2 and take cases to the grand jury, and also had an opportunity
3 to try cases in the Supreme Court, in front of Supreme Court
4 justices.

5 After spending about three years or so in
6 Anti-Bias Bureau, I was then assigned to the Supreme Court,
7 trial bureau, where I had -- I was assigned to the trial part
8 of Justice Joy, who was sitting at that time in, on Sutphin
9 Boulevard in Queens.

10 I spent -- I was there up until he was promoted
11 to the Appellate Division.

12 I was then transferred to other judges where I
13 worked in the Supreme Court for about another three to four
14 years.

15 After doing that, I was then promoted to the
16 Major Crimes Career Criminal Bureau.

17 I worked there for approximately two-and-a-half
18 years.

19 And after working there, I was then promoted to
20 the Homicide Trial Bureau, where I worked with about seven or
21 so assistants, until I resigned in December of 2002.

22 Q How long were you in the homicide bureau?

23 A I was in the Homicide Bureau for a little bit over two
24 years.

25 Q And how many cases did you try to conclusion while you

1 were there?

2 A In the Homicide Bureau?

3 Q Yes, in the Homicide Bureau.

4 A While I was there, I tried maybe, between 15 and 20
5 cases while I was at the, in the Homicide Trial Bureau. I had,
6 I think, for two years I was there, I tried the most cases
7 among my peers in the Homicide Trial Bureau.

8 However, prior to me coming to the Homicide
9 Bureau, I had tried several homicides, I think at least three
10 or four homicides that I had tried prior to actually coming to
11 the bureau, so under my belt I had competently 20 or so
12 homicides under my belt.

13 Prior to that, where felony trials are concerned,
14 I had close to about 70 or so other trials that I did in fact
15 try in the District Attorney's office.

16 Q Now, Mr. Stuart, the case that brings you here, that
17 was a homicide case; is that correct?

18 A That is correct.

19 Q What was the name of that case?

20 A Tyrone Johnson, People versus Tyrone Johnson.

21 Q Okay.

22 And can you tell us when you first were assigned
23 to that case?

24 A I was first assigned to that case when I first came to
25 that bureau, which was two years before I departed, which was I

1 think in the year 2000.

2 Q And?

3 A And this case was transferred to me from another
4 assistant, who was handling the case at that time.

5 The case was still in -- I think some of the
6 hearings were completed, but not all of the hearings were
7 completed at the time, but that was the stage in which I
8 inherited the Tyrone Johnson case.

9 Q And can you tell us what the case was about?

10 A This was a murder case that occurred on February 5 of
11 the year 2000 in south Jamaica, where the victim was accosted
12 by two African males in front of his residence with guns.

13 There was some struggle, and he was fatally shot
14 in front of his home.

15 He was able to crawl to his door, ring his bell,
16 and was able to, before he passed out, was able to speak to his
17 mother and indicate at least one of the assailants in this
18 case, which was the person who we tried the case against,
19 Tyrone Johnson.

20 Q So he mentioned Tyrone Johnson as being one of the
21 perpetrators to his mother?

22 A Yes. He didn't call it -- full name, he said
23 something, Tyrone, with the Navigator, because at the time one
24 of the descriptions of the vehicles used in the case was a
25 Navigator, where it was -- where the perpetrator was allegedly

1 travelling in it.

2 Q And when that -- before the case came to trial were
3 there DD-5s?

4 A Yes, there were DD-5s that, most of which were turned
5 over by my predecessor.

6 And I came into the case, and I think we had, we
7 may have had one or two hearings remaining, I'm not certain,
8 but, however, there came a point in time when the case was
9 ready for trial, and when I personally took it upon myself to
10 re-issue all of the -- all DD-5s that were in my possession.

11 You have to make certain that the defense counsel
12 had every paperwork involved in this case.

13 Q Now, for our purposes and for the record, a DD-5 is a
14 report, and the form is called DD-5.

15 It's a report made by a detective of what he's
16 done in investigating the case; is that correct?

17 A That's correct.

18 Q Now, there is a DD-5 which is offered in evidence by
19 Ms. Broder, as Exhibit 4.

20 Could you look at that DD-5?

21 A Sure.

22 (Perusing.)

23 A Yes.

24 Q And are you familiar with it?

25 A I'm familiar with this DD-5, yes.

1 Q Now, when you were trying this case, did you attempt
2 to -- withdrawn.

3 Had you intended to call her as a witness when
4 you started the trial of this case?

5 A No.

6 Q Why?

7 A Well, based on this DD-5, she did not see the actual
8 shooting. The actual shooting occurred at least I think about
9 12 or so minutes after she alleged she was at the window
10 looking outside.

11 But from this DD-5 there was no, it was certainly
12 not my position or the People's position to be calling her as a
13 witness.

14 Q I take it that the house you are referring to was a
15 house that faced out in some fashion upon the street where the
16 shooting took place?

17 A That's correct.

18 Q Now, and, again, I'm assuming that that DD-5 contains
19 no information which --

20 MS. BRODER: Objection. Leading. It's a leading
21 question.

22 SPECIAL REFEREE: Yes.

23 MR. KARP: But you have a DD-5 in evidence just
24 summarizing what's in that DD-5.

25 MS. BRODER: Right. You are asking him -- you

1 are assuming.

2 I'm saying you should ask him the question.

3 Q Does the DD-5 indicate that this woman saw who the
4 perpetrator was, or perpetrators were, in this case?

5 A No.

6 Q And the DD-5, was that taken by detectives?

7 A Yes.

8 Q How many?

9 A It was taken by Detective Barton from the Queens, I
10 think it could be QHS or Queens Robbery or Queens -- I don't
11 remember, but looks like QHS, but it was taken by a detective.

12 Q And did there come a time that during the trial --
13 withdrawn.

14 Did there come a time when the trial advanced to
15 a point where the Defense was called upon either to make a
16 defense or not?

17 A Okay. Can you please repeat that?

18 Q There came a point in time when the People put its
19 entire case in; is that correct?

20 A That's correct.

21 Q And at that point, did you learn that the Defense
22 intended to put in a case?

23 A Yes.

24 Q Did you know what that would entail?

25 A No. I would have just been guessing at that point.

1 Q And what did you learn the defense case was?

2 A Well, at that juncture, it was my belief that the
3 defendant was going to take the stand.

4 We broke on a Thursday when I was -- when the
5 People completed their case.

6 Friday the -- we were not going to be in session
7 because the defendant practiced the Muslim faith so the next
8 day would have been Monday; Monday, June 3rd.

9 I just assumed, since he had indicated to the
10 Court that he was going to put on a case, that it would have
11 been the defendant.

12 Q And when the Defense put in its case what was the case
13 that they put in?

14 A They put on a person by the name of Stanley Gaskin.

15 Now, Stanley Gaskin was a witness who testified
16 for the Defense, and basically said that that he was in the
17 house when the shooting occurred.

18 And the People's main witness, because in our
19 case we put on a witness by the name of Henry Hanley, and he
20 made statements to the fact that our witness Henry Hanley was
21 not in a position to account for this murder because he was
22 inside the house and not outside the house at the time of the
23 shooting, if I can just expand.

24 Henry Hanley was a witness that the People used
25 in their case because Henry Hanley earlier, before I got into

1 the case, had negotiated an agreement that he would testify for
2 the People on the condition that he got a lesser sentence. I
3 think he got -- facilitation I think was the crime that that he
4 pled guilty to, but Henry Hanley's role in all of this, he was
5 the person who set everything up.

6 He was told -- the two perpetrators had
7 approached Henry Hanley earlier in the morning and offered him
8 a sum of money to give them a call when the victim in this case
9 arrived at home.

10 On two separate occasions he had called them only
11 to find out that once the two individuals arrived at the loft,
12 the victim had already left.

13 So, according to the testimony, he was given a
14 walkie-talkie, and was told as soon as the victim comes you
15 give us a call on the walkie-talkie, and we be right there.

16 About 2 a.m. that morning I think the victim
17 returned home that morning. Henry Hanley made the call, and
18 according to his testimony, in a few minutes, the perpetrators
19 arrive at the scene, and in front of him, while he was sitting
20 on his stoop to his house, had an argument with the victim, and
21 one of the perpetrators, Tyrone Johnson, pulled out a gun and
22 shot the victim in this case.

23 MS. BRODER: I just want to note for the record
24 my objection to a lot of the testimony as hearsay.

25 As long as we understand that he's not testifying

1 to the truth of the matter, just what he understood
2 Mr. Hanley's testimony to be.

3 SPECIAL REFEREE: That's fine.

4 That's fine.

5 MR. KARP: You're testifying now as to what he
6 testified to in court?

7 A Right, I'm summarizing his testimony. Yes, I am
8 summarizing his testimony.

9 SPECIAL REFEREE: That's understood.

10 A So, this, in addition to the fact that we had dying
11 declaration about a Tyrone with a Navigator who committed this
12 murder, from the victim, Henry Hanley's testimony was crucial
13 to the People's case.

14 If Henry Hanley's testimony is negated for any
15 reason, our case become extremely weak.

16 So, what transpired in this case: A person by
17 the name of Stanley Gaskin testifies, and his testimony, I'm
18 summarizing, was in essence that he was present in the Hanley's
19 home that morning, with Henry Hanley's sister who he was dating
20 at that time.

21 Q What was her name?

22 A Her name was Kameesha Grant.

23 And he remembered this incident because they were
24 in the basement, he and --

25 MS. BRODER: I'm just going to object to the

1 description of the testimony. I think it's sufficient for
2 Mr. Stuart to argue that Mr. Gaskin's testimony would have
3 contradicted Mr. Hanley's testimony, and not re-visit the
4 underlying criminal trial.

5 THE RESPONDENT: I'm not going to do that.

6 MR. KARP: Except that I think it is essential
7 because this witness did testify, and now explains away the
8 testimony of Gaskin.

9 MS. BRODER: Right, but it's my argument it's
10 sufficient to say that, versus revisit what testimony was
11 in a trial.

12 MR. KARP: I don't know.

13 SPECIAL REFEREE: Let's give him a little leeway
14 I want to hear the whole story.

15 Q Continue?

16 A Mr. Gaskin testified that he was with Kameesha Grant
17 in the basement, and he was aware that Henry Hanley was inside
18 the house, and not outside when he heard the shooting, because
19 several times after -- or once they had heard the shooting, he
20 had come upstairs and Mr. Gaskin testified that Mr. Henry
21 Hanley was in the back of the house playing some videogame at
22 approximately 2 a.m. that morning.

23 That, in summary, was the extent of his
24 testimony, which brought into question the testimony of our
25 main witness, Henry Hanley.

1 Q And did you then do anything to obtain or to find
2 other witnesses who might shed light on the situation?

3 A Okay.

4 Now, this occurred on, this occurred on June 3rd,
5 when Mr. Gaskin testified.

6 June 3rd.

7 Q Are you sure it wasn't the first?

8 The 3rd?

9 A The 3rd, yes, on June 3rd.

10 Now one of the things I previously -- prior to
11 June 3rd, on May the 31st, May 31st we were able to locate
12 Henry Hanley's aunt, Shanice Knight, who lived in that
13 residence.

14 Two detectives and myself, after doing some
15 extensive search prior to that point, was able to locate the
16 person Shanice Knight which is the subject of the exhibit,
17 which is Exhibit?

18 Q That Exhibit is 4?

19 A Yes, Petitioner's Exhibit 4.

20 She was spoken to, and she basically confirmed
21 what was in the DD-5, that she didn't see anything, she was in
22 the house, she heard the shooting, and basically, there are
23 shootings in that neighborhood all the time, she paid no
24 particular attention to this particular shooting at that point,
25 after --

1 Q Excuse me.

2 Did she tell you anything about Gaskin?

3 A She did tell us who was in the home.

4 And I remember she told us at the time of the
5 shooting was Henry who was home at that time, and I believe
6 that was the only person she had indicated to us was home.

7 She did not even mention anything about her niece
8 Kameesha Grant being home or anybody else, or Mr. Gaskin being
9 at that, at her residence at that time.

10 So, after Mr. Gaskin testified, and indicated
11 that he was present, he was with Kameesha Grant, and our main
12 witness was not even outside, it became extremely important for
13 the People at that time to try to locate, or at least try to
14 contact Ms. Shanice Knight.

15 When the detectives and I had spoken to her on
16 May the 31st, we had secured numbers to her home, and to her
17 place of business, which we had in our possession at that time.

18 So immediately after the defense rested, because
19 they only call one witness, which was Stanley Gaskin, the
20 defendant did not testify in this case, and their testimony was
21 concluded in the afternoon of June 3rd, I asked the Court for a
22 recess to determine whether I would put on a rebuttal case the
23 following morning.

24 The Court granted that request.

25 And immediately after returning to my office,

1 which was sometime close to 5 o'clock, or in that vicinity, I
2 immediately tried to reach out and tried to see if I could
3 reach out to Shanice Knight, because it was my intent if I
4 could have located her at that time, that I would have called
5 her on my rebuttal case as a witness, and certainly negate the
6 fact that Mr. Gaskin was actually at the home, and to testify
7 that Henry Hanley wasn't even outside at the time of the
8 shooting.

9 So I called the numbers which I had; I called her
10 home. I think a child answered the phone. The child indicated
11 she didn't know where she was or when she was coming back.

12 I was then -- I also had her work number and I,
13 immediately after hanging up, maybe a few minutes later, I
14 called her work.

15 I spoke to a colleague or a supervisor, I don't
16 remember exactly who it was at that time, who indicated that
17 she wasn't there, and they didn't know where she was or whether
18 she was coming in, or even working that particular day.

19 After doing that, I think I approached one of the
20 detectives, you know, and we spoke about the possibility of
21 locating Ms. Knight, and I also spoke about the possibility of
22 locating Ms. Knight's niece Kameesha Grant.

23 We didn't have any or little information about
24 Kameesha Grant at that time. We did a database search. A few
25 names came up in the Bronx that was focusing our search to the

1 Bronx.

2 There was an address, possible address which was
3 given to the detective.

4 And it was suggested that I try to call Ms. --
5 again, Ms. Knight, Shanice Knight. I think I made at least
6 another call later on that evening at her employment, and to no
7 avail. She was not present.

8 They were giving me absolutely no information
9 about where she was, and I was at that point in time under the
10 impression that she was either trying to avoid me, but
11 certainly not making it easy for me to locate her again.

12 Our attention, then, was focused on either
13 finding Ms. Knight or trying to locate this other witness
14 Shanice -- not Shanice, Kameesha Grant, Kameesha Grant.

15 The detectives were given this information, and I
16 know this was approximately around, almost 7 o'clock at this
17 point.

18 And I know they were going to either make one
19 call to the Bronx to see if they could find either one of these
20 people, if any, and I told the detective on departing that, you
21 know, I will also make some phone calls myself to try to locate
22 Kameesha Grant, because at least Kameesha Grant doesn't know
23 I'm looking for her.

24 And what transpired was that we had a
25 relationship with the, what do you call it, the child welfare

1 offices in New York.

2 Both of these, the entire Henry Hanley family was
3 on some type of sustenance support from the city. And I was
4 able to call a hotline number to locate a possible person by
5 the name of Kameesha Grant that was living in a shelter in
6 Brooklyn.

7 They did not want to confirm whether she was
8 there based on the fact that this was a telephone conversation.
9 They wanted either a letter from our office, I think around
10 that time I was already at home, it was around 9 p.m. that
11 night, or an individual from my office to appear.

12 So the first thing I did, I called our hotline in
13 the Queens District Attorney's office to speak to one of the
14 detective supervisors.

15 And I explained to him the circumstances. And
16 the first thing the following morning two detectives went to
17 this particular shelter, which was in Brooklyn, and called me
18 from there, and confirming that the person Kameesha Grant was
19 residing there, and they were bringing Kameesha Grant to my
20 office in the Queens District Attorney's office that morning.

21 That morning, I had a brief conversation with
22 Kameesha Grant, had indicated she had broken up with Stanley
23 Gaskin months before the shooting, and in fact she wasn't even
24 at home when the shooting occurred, she was out, and came home
25 after the shooting that morning, and wasn't advised by Henry

1 and her aunt of the shooting that occurred across the street
2 from their home.

3 I immediately called Judge Rios's chambers and
4 alerted him that I did in fact have a rebuttal witness which I
5 will put on.

6 And Kameesha Grant did in fact testify in the
7 People's case and stated exactly what I indicated, that Gaskin
8 was not there, that they had broken up several months before.

9 And the People rested their case after the
10 testimony of Kameesha Grant.

11 Q Now, during the course of the trial, an earlier date
12 defense counsel had made a request for whereabouts of Shanice
13 Knight; is that correct?

14 A That's correct.

15 Q And at that point in time, did you know where Shanice
16 Knight was?

17 A No, because the location where she resided which was
18 in fact on this DD-5, she had moved from that location
19 apparently a month or so later, because we had spoken to
20 several of the neighbors when preparing the case, even prior, I
21 went to the neighborhood, spoke to the witnesses, saw where the
22 crime occurred, spoke to neighbors, and went across the street
23 where Ms. Shanice Knight was supposedly living, and was told
24 that, you know, that she was no longer at the address had moved
25 several years prior to that point.

1 Q And you so indicated to the Court; is that correct?

2 A And I so indicated to the Court when the Court in fact
3 inquired of me whether or not I know where Shanice Knight was.

4 Q Now, a similar request, or perhaps not the same words,
5 were used around January 4th; is that correct?

6 MS. BRODER: June.

7 Q June, I'm sorry.

8 A June 3rd.

9 Q June 3rd?

10 A No, June the 4th, yes.

11 Q Can you tell us, did the judge inquire of you as to,
12 in words or substance, whether you knew where Shanice Knight
13 was?

14 A Right. The judge indicated that something to the fact
15 that previously I indicated I did not know her whereabouts, is
16 that correct, and I said yes.

17 And he said, is that still your position? And I
18 said yes.

19 But that's what the Court inquired.

20 Q Now, when you made that statement, I mean, we know you
21 made the statement because it's part of the record. But have
22 you reflected upon it in terms of your response?

23 A I had, over the last year and-a-half, almost two years
24 I had a lot of opportunity to reflect on that.

25 Q And have we discussed it?

1 A And I've discovered it with you, I've discussed it
2 with other members of the bar.

3 I've even discussed this in some length with some
4 justices.

5 And, you know, it is, I have certainly concluded
6 that I certainly made an error or a mistake in judgment, in not
7 being fully disclosed to the Court at that time, that even
8 though I could not have located her, I attempted to locate her
9 just the previous day, and my belief is that she was either
10 trying to abscond or hiding from me, that I did in fact have
11 some contact with this witness the previous Friday, which was
12 May 31, 2004.

13 Q So, in other words, you should have indicated to the
14 Court that at least four days before, you knew exactly where
15 she was because you visited her?

16 A That's correct.

17 Q And that subsequently thereto you couldn't find her
18 again by telephone, and you could have made all of that
19 information made known to the Court; is that correct?

20 A That's correct.

21 Q And you recognize you should have done that?

22 A Yes, I certainly have, 20/20 is -- hindsight is
23 20/20.

24 And, you know, in, I guess in the heat of the
25 moment, and I mean, I answered the question very narrowly. I

1 should not.

2 And I should have at least expanded and gave the
3 Court, you know, at least the option of taking whatever action
4 that they deem, that they wanted to do at that point in time.

5 But certainly I felt at that time, that because
6 of -- I may not be able to locate this person within that 24
7 hours, that she was certainly hiding or making herself
8 unavailable, and I certainly I didn't know her whereabouts at
9 that time, but certainly I should have been able to expand and
10 explain that to the Court, which I didn't.

11 But certainly it was not my intent to in any way,
12 shape or form mislead this Court. I have tried, as I
13 indicated, about 20 homicide cases, but in the same token, I
14 mean, I have been in the career criminal bureau, and had tried
15 a lot of violent bureaus, including kidnappings and attempted
16 murders, where witnesses appear and disappear within hours.

17 You know, if they know that they are possible
18 witnesses, I know you know where they are, and they know the
19 case is on trial, and they have an idea of which the case is
20 going to be concluded, there are many times we have taken the
21 liberty of taking a witness right then and there with a
22 material witness order and securing that witness until the
23 trial is over.

24 But in this particular case, I mean, she, at the
25 time I spoke to her, with the detectives on May 31st, she was

1 not really a witness that the People would have used since she
2 brought nothing to the table.

3 It was important for me to find her; however,
4 because it has always been my position that there no other
5 person other than I have prosecuted. I strongly feel that
6 person I've prosecuted; I was always under the belief that this
7 was the right person, was not a mistaken identification or
8 wasn't any type of mistake.

9 And this was it's only person in the scheme of
10 things in this trial which I didn't have any contact with or
11 had spoken to in reference to this case. And her house was
12 right opposite the actual shooting.

13 Through a DD-5, defense made several allegations
14 and several motions to locate this particular witness, yes. It
15 was my belief and certainly it was, I believe it was, even
16 though I didn't have a legal duty to locate her, it was a moral
17 duty on my behalf to try to speak to this witness and find out
18 if she had anything to do with this case, could shine any light
19 on the defendant Tyrone Johnson, so that I can insure so that
20 if this person is convicted, that we have the right person in
21 this case.

22 And that's the only reason why I persisted in
23 continuing to look for this person, able to contact this
24 person, but never use this person on my direct case.

25 Q Would you indicate, do you consider that in responding

1 to the Court in the fashion that you did, that that was the
2 wrong thing to do?

3 A That was certainly the wrong thing to do. As I
4 indicated I had many time to reflect on my response. I looked
5 at the transcript over, and over, and over again, word by word.
6 And, you know, and there are times, I know we're all not
7 perfect. I'm certainly not perfect.

8 And I made the wrong judgment call by just saying
9 "yes" instead of explaining just a little bit more.

10 And I wish I would take this all back in the
11 opportunities that arose prior to this juncture. Had I had an
12 opportunity to make a different statement, and this occurred
13 primarily when certain motions were made in reference to this
14 case, I think it was called 30.30 motions, were made, three
15 30.30 motions were made, and certain of these allegations were
16 made.

17 And I wanted to write an affidavit to explain
18 this is what occurred.

19 At that juncture once the motions were made my
20 office took the position, one, that I wasn't going to respond
21 to the motion; the motion was assigned to an assistant district
22 attorney in the appeals bureau.

23 And I drafted an affidavit, and the affidavit was
24 submitted to that assistant.

25 It was then decided among my peers that the

1 motion was going to be filed without my affidavit.

2 And an attempt was going to be made to win the
3 motion on the law itself.

4 Upon doing that, and submitting that response to
5 the Court, Judge Rios then decided that, fine, because the
6 moving party did in fact respond in a reply saying, A, how
7 could you decide this motion without an affidavit from an
8 Assistant District Attorney?

9 The judge basically agreed and said, okay, he's
10 not going to have an affidavit, but what we're going to do,
11 we're just going to conduct a hearing and as to what will be
12 produced to explain when he found out the whereabouts of this
13 witness, and what had transpired subsequent to that.

14 That occurred. I was then informed by my
15 supervisors that under no circumstances that I am going to
16 testify.

17 MS. BRODER: I am going to object to this
18 direction. I'm a confused as to what the relevance of it
19 is.

20 MR. KARP: I think it's relevant in terms of
21 mitigating. If a person says -- testifies that what I did
22 upon reflection was wrong, and the opportunity that I had
23 to correct it, when I did, I was thwarted because my
24 supervisors told me not to do it, we're going to go on the
25 law and not on the facts, I think it's relevant.

1 SPECIAL REFEREE: Yes. We'll allow it.

2 Continue.

3 A And at this point in time, I think at this point in
4 time I think it's important to note that the media took this
5 case, and it was very visible on Channel 7 and some of the
6 local newspapers, especially the Daily News and the Post, and I
7 was called into my chief executive office, and was told that
8 the decision was that I was not going to testify in a hearing,
9 and a decision will be made whether or not a letter was going
10 to be written by the Queens District Attorney's office
11 consenting to have this entire case retried.

12 And isn't it a fact I was later then informed
13 that was going to be a decision of the Queens District
14 Attorney.

15 A letter was then sent to Judge Rios and
16 administrative judge and other personnel in the judiciary
17 system, and I wasn't allowed to testify.

18 So as of this date, you know, no one had ever, no
19 one even had heard any type of explanation or even Judge Rios
20 have never even heard from me, how sorry I was in not
21 expanding, or any explanation for anything.

22 All he has is exactly what the District Attorney
23 supplied to him, basically that "I knew where the witness was,
24 and that they have agreed to re-try the case."

25 And as I indicated, as of this date I still

1 haven't had time.

2 Q Was the case retried?

3 A The case was retried basically the same evidence, and
4 the --

5 MS. BRODER: I going to object as to what the
6 evidence was in that case when it was retried. It wasn't
7 retried by Mr. Stuart.

8 A Okay.

9 SPECIAL REFEREE: Case was retried.

10 A Case was retried, and the defendant was convicted
11 again for the second time.

12 MR. KARP: I have no further questions.

13 SPECIAL REFEREE: Okay.

14 Thank you.

15 THE WITNESS: Is it proper for me to confer even
16 though I'm on the stand with my attorney.

17 SPECIAL REFEREE: I have -- do you have an
18 objection?

19 MS. BRODER: No.

20 (Pause in proceedings).

21 MR. KARP: Mr. Clark, I have a few more questions
22 I would like put to the witness.

23 SPECIAL REFEREE: Okay.

24 DIRECT EXAMINATION

25 BY MR. KARP (cont'g):

1 Q Some of the character witnesses were questioned about
2 another case that you handled, I think it was 1998, in which
3 the Appellate Division wrote an opinion concerning a motion to
4 set aside a verdict?

5 A Uh-huh.

6 Q Can you just tell us, what that case was about?

7 A That case was in reference to a robbery case, where
8 the, where the victim was returning from a store, which was
9 returning from a grocery store, I think it was a Chinese store
10 at that time, bringing her, his pregnant wife, Chinese food.

11 It was in the middle of the night. He was
12 approached by two individuals with a gun, who took away
13 whatever money he had, asked him to lie face down on the
14 ground, and he was shot two times in the head and three times
15 in the back. The case was tried in --

16 Q He survived, didn't he?

17 A Yes, he survived. He was quadriplegic and it took
18 several years for the case to get to trial.

19 And one of the -- and hence there was no
20 eyewitness in this case at all.

21 He was shown a photo array based on -- this
22 photo array was generated as a result of the fact that the
23 defendant Jay Walters in this case, in this part of the case,
24 was found in possession of a .38 caliber weapon which was a
25 similar weapon used in this case.

1 The photo array was conducted, in which at that
2 point in time he had lost his speech, and he was only able to
3 make motions with his head.

4 And he did in fact identify the defendant Jay
5 Walters in this case. This case was tried with just that
6 evidence. There were no definitive ballistic evidence that was
7 introduced in that case. However, in summation, the defense
8 counsel brought up the fact of this other .38 which led to him
9 being part of this photo array, and made reference to the fact
10 that we didn't introduce this photo.

11 MS. BRODER: I am going to object. Again, this
12 is hearsay.

13 SPECIAL REFEREE: Well, it's hearsay, but the
14 subject has been introduced on cross, and let's explore it;
15 there's no harm here.

16 A Where was I?

17 Q I think you said defense counsel had talked about
18 another gun not being introduced?

19 A Right, the .38, which was the basis for putting him in
20 this photo array with this victim, and he, in his summation, he
21 indicated that the People didn't introduce this weapon, and
22 made several allegations about the fact of how weak my case
23 was --

24 MS. BRODER: I am going to object to the hearsay
25 again.

1 SPECIAL REFEREE: All right.

2 A And it was a very negative impact.

3 In reference to the fact that I did not introduce
4 this .38 which the jury had already heard about; in response,
5 in response to his comments, in my summation, I made reference
6 to the fact, one, yes, that the gun wasn't introduced, and I
7 did in fact say that the gun could have been the weapon used.

8 Now, to give you a little background, there was a
9 ballistic report in reference to this case. A detective at the
10 time was Detective Amato, A-M-A-T-O from the ballistic squad.
11 And his, after interviewing him, the very best he could give me
12 in reference to the ballistic recovered, because they were so,
13 the ballistics recovered, I think were the fragments and stuff
14 from the scene, the best he would have been able to testify to,
15 would have been that these, this evidence was consistent with
16 this .38.

17 I choose not to present any evidence about the
18 .38 in the case, based on that.

19 And when I responded that it could have been the
20 .38, I was reflecting on the fact that I had a report, and
21 would have had testimony from Detective Amato saying that he
22 could it could have been consistent with a .38. Amato would
23 not have been able to tell me definitively that it was the same
24 weapon, but would have been able to tell me it was "consistent
25 with." And it was in that light that I made those statements,

1 which was cited in the decision of the Appellate Division.

2 Now, subsequent to that case, and a conviction in
3 the case, obviously there was a conviction in the case, the
4 case was appealed. Our office responded to that motion. And
5 when these, this question came out, we had several
6 conversations with my superiors in the office about what had
7 transpired.

8 They had an opportunity to look at the
9 transcripts. I mean, I had an opportunity for the first time
10 to see the kind of response that was made, and, you know, it
11 was determined by my superiors that probably the answer that we
12 gave was not that sufficient or clear enough.

13 But subsequent to that, about maybe a year or so
14 after this decision made out, I mean, I was promoted to the
15 homicide trial bureau subsequent to this decision.

16 MR. KARP: I have nothing else.

17 SPECIAL REFEREE: Do you care to cross?

18 MS. BRODER: Thank you.

19 CROSS-EXAMINATION

20 BY MS. BRODER:

21 Q Mr. Stuart, you've testified here just before, where
22 you basically said that no one had given you an opportunity to
23 explain yourself in this case, correct, when you were talking
24 about the District Attorney's office?

25 A Right.

1 Q And -- but the truth of the matter is, that you sat
2 in this office and gave sworn testimony under oath?

3 A That's correct.

4 Q And at that point, that was back in September of 2003?

5 A Uh-huh.

6 Q You had full and fair opportunity to explain what
7 happened in the case of the People versus Tyrone Johnson,
8 correct?

9 A Yes, and I think I did.

10 Q And isn't it true that at the time that you testified
11 under oath, you maintained that your answer to the Court was a
12 proper answer?

13 A If that is what my testimony is. But subsequent to
14 that, I mean, there was a lot of reflection on my part. In my
15 mind, at that juncture that's -- I knew that there was no
16 intent in my part to deceive the Court or mislead the Court.
17 And that is based primarily on the fact that I was looking for
18 this person for myself on my rebuttal case. However,
19 subsequent to that I've had opportunity to speak to justices,
20 and how they would have felt if I had said that, which gives a
21 different light.

22 And I've also had numerous conversations with my
23 attorney, other conversations with defense counsels, and I have
24 determined that it was -- I made the wrong call. This was a
25 bad judgment call that I made at that point. And that's why,

1 if my testimony was different, it was because I had other
2 opportunity to reflect.

3 Q But when you previously testified you made it clear
4 that you felt that at the time the judge asked you, do you have
5 any knowledge as to where this witness is, that it was your
6 belief the judge meant at that particular point in time as you
7 were standing in front of that judge; is that what was going
8 through your mind that day, is that your testimony?

9 A I don't know exactly what I said. What was going
10 through my mind at that point in time was that, because this
11 haven't been the first time that something like this have
12 happen to me, that the witness was consciously trying to avoid
13 me.

14 Q You said -- I'm sorry?

15 A So when the judge asked if I knew the whereabouts, if
16 that's still my position, in my mind it was okay, like, I don't
17 know where she is, she's trying to avoid me.

18 And I said, yes, that's still my position. What
19 I should have done, which I didn't do, was to say yes, Judge, I
20 don't know where her whereabouts.

21 However, I did in fact have some contact with her
22 the previous trial. I didn't do that, and I'm looking back and
23 conferring with my attorney and other justices. That was a
24 mistake.

25 Q Well, what's interesting, Mr. Stuart, is I am going to

1 take you back to May 8, 2002.

2 At in point in time Shanice Knight's name came up
3 regarding her DD-5, correct? Defense counsel was arguing that
4 they had not received a copy of Shanice Knight's DD-5 prior to
5 your turning over at that date, correct?

6 A Okay, uh-huh.

7 Q And you also had also stated this was a very difficult
8 homicide case because essentially it rose and fell on Mr.
9 Hanley, right?

10 A Yes.

11 Q It's really a one-witness murder case?

12 A That's correct.

13 Q So if Mr. Hanley's testimony is contradicted or
14 tainted in any way, it was going to hurt the Prosecution?

15 A That's correct.

16 Q And the defense counsel at this point, when they get
17 the DD-5, and they allege this is the first time they've seen
18 it, it was their position that the information she had given
19 was exculpatory, because she didn't see Mr. Johnson's picture,
20 you know, photo array, as the person the victim was talking to
21 when she looked out the window, right?

22 A (Pause).

23 Q Do you want me to rephrase?

24 A Yes.

25 Q In her DD-5 she had said she had witnessed the mother

1 of the man talking to a man, and then left the window; 15
2 minutes later there were gunshots?

3 A Yes.

4 Q The police showed her a photo array and she couldn't
5 identify anyone as being the person, but Mr. Johnson's picture
6 was in that photo array?

7 A Yes.

8 Q It was your argument that this information was not
9 exculpatory because you claim she didn't witness the homicide,
10 simply witnessed a conversation between two people, correct?

11 A Uh-huh.

12 Q But at the same time it was defense counsel's position
13 that the photo array identification, the fact that the
14 defendant wasn't identified, was exculpatory, correct?

15 A That's correct.

16 Q So this became a very important issue, obviously,
17 correct?

18 A Yes.

19 Q You said it yourself you are a very seasoned
20 experienced prosecutor.

21 What is the danger of failing to turn over Brady
22 material or exculpatory material what's the danger in a
23 prosecutor's case?

24 A In a prosecutorial's case it obviously could damage
25 the case.

1 Q How extensively?

2 A It can result in a dismissal of the indictment.

3 Q That's the most serious sanction that a Court could
4 give on Brady, correct?

5 A Sure, sure.

6 Q And it could be as light as, just advising the jury,
7 giving some form of advisement to the jury when they're you
8 deliberating?

9 A That's correct.

10 Q As a prosecutor, you'll never know. It's all within
11 the judge's purview, correct?

12 A Correct.

13 Q Now, a Brady issue is raised in this case and the
14 defense is focusing on Ms. Knight.

15 And I am going to read to you from Petitioner's
16 Exhibit 75 in evidence.

17 I am going to refer to page 43.

18 At the bottom. The Court says: Do the People
19 know, has anyone on the Prosecution side been in contact with
20 this witness? That's what they asked you, right?

21 A Yes.

22 Q And did you answer yes or no?

23 A I don't know. What was my answer? I don't know.

24 Q I'm asking you if you recall did you answer yes or no?

25 A No, I don't recall what my answer was. I most likely

1 would have answered no because I didn't know where she was.

2 MR. KARP: What date are you referring to?

3 MS. BRODER: I'm looking at page 43 of May 8,
4 2002.

5 MR. KARP: May 8th.

6 Q I'll read from evidence: "Mr. Stuart: Judge, since
7 this morning, I have -- we have made several attempts in
8 trying to locate this witness. Her last address was in
9 Queens?"

10 A Uh-huh.

11 Q "She's no longer at that residence. Before I left, I
12 had information that they were being, tracking another
13 residence in Manhattan for her. And they continue to work on
14 that, but right now as I stand here before you I cannot
15 indicate to this Court that we have located her as of yet."

16 That was your answer?

17 A Yes.

18 Q It wasn't a yes or no, it was a detailed
19 description --

20 A Right.

21 Q -- of all the reports you had gone to find Ms. Knight?

22 A That's correct.

23 Q But you testified when Mr. Karp was asking you
24 questions, that at that point in time, she wasn't a very big
25 concern for you, correct?

1 A Right.

2 Q So you weren't really looking for her?

3 A Okay.

4 Q You testified that you first really started looking
5 for her actively was after -- well, obviously when your
6 detectives told you that they found her on the 31st of May,
7 correct?

8 A No, that's not, if that's the impression, then
9 certainly that's the case. I started trying to locate this
10 person from the time I went to the scene, which was prior to
11 jury selection, could not locate this person.

12 Throughout the trial because I -- throughout the
13 style, we had continued to try to locate this particular
14 witness. The main reason was because the judge had ruled, I
15 think, several times during the proceeding that Ms. Knight's
16 testimony, if at all, was not Brady. There was no issue here
17 of Brady.

18 Q Well, Mr. Stuart I'm going to stop you because you're
19 misstating what was going on.

20 This was when the Brady allegation was raised,
21 and the judge -- it was the first time on the record where you
22 turned over the DD-5.

23 A Fine.

24 Q And defense counsel said, hey, wait a minute, I never
25 received this particular DD-5. You gave it to them earlier

1 that day.

2 And "now we think it was Brady." So this is when
3 the Brady issue first popped up?

4 A I'm not disagreeing with you. I'm not disagreeing
5 with that.

6 I'm saying that we started looking for this
7 witness, and I don't exactly remember what juncture in the
8 trial but at somewhere during the trial the judge had indicated
9 that this witness was not Brady.

10 Q That was after this colloquy?

11 A Fine. Sometime during the crime. I'm not citing
12 that particular day and even subsequent to that. I still
13 continued to try to locate this witness, despite the judge's
14 ruling. I had no obligation to do that, and I still did. And
15 I did it not on see type of legal duty but certainly, based
16 solely on my moral obligation to make certain that this person
17 was the right person that committed this crime, the only person
18 we did not interview who could have been a witness.

19 Q Had you interviewed Kameesha Grant before that day
20 that you saw her June 4th?

21 A There was no DD-5 or anything to even indicate that
22 Kameesha Grant was even at that house. As a matter of fact
23 there wouldn't have been any because she wasn't there during
24 the shooting.

25 Q Okay, Mr. Stuart, but I'm focusing right now on your

1 answer, your direct answer, your answer to this judge's direct
2 question, which basically: "Has anyone on the Prosecution side
3 been in contact with this witness?"

4 I asked you if you gave a yes or no answer; in
5 fact you gave a narrative, correct?

6 A Okay.

7 Q And at the end of the narrative you stated "as I stand
8 here before you I cannot indicate to this Court that we have
9 located her as of yet."

10 A That's correct.

11 Q Now, at that point, the judge entertained -- even the
12 defense counsel wanted to put in papers regarding the Brady
13 issue, too, correct?

14 A I don't recall but.

15 Q Do you recall the judge?

16 A I do recall that the defense attorney put in some type
17 of papers at some point because the judge reserved decision and
18 came back with a decision.

19 Q And ultimately the judge made a ruling and said --
20 actually, before I get there, the judge did make the ruling and
21 stated: "I am going to find that this is not Brady, but I may
22 revisit this if additional evidence proves, shows additional
23 evidence that would cause me to revisit this issue," correct?

24 A You have that.

25 Q I'm asking your recollection.

1 A No, I do not recall, but it sounds correct.

2 Q I am going to read you from evidence page 53, bottom,
3 line 24.

4 "QUESTION: However, because the Court does not
5 know what evidence is going to come forth, the Court
6 recognizes that the interests of justice may warrant the
7 Court's reconsideration of this application as the trial
8 progresses, because if it turns out that the testimony of
9 Sharice -- what's Sharice's last name?

10 "Mr. Stuart: Knight.

11 "SPECIAL REFEREE: Sharice Knight is probative of
12 material fact that could possibly exculpate defendant, then
13 I certainly I will if not on the application of defense, on
14 my own motion reconsider this argument.

15 "In summary, the motion for a continuance of two
16 weeks is denied, and the Court will recess until Monday and
17 the defense has an exception."

18 So it's fair to say that the Brady issue was not
19 a closed matter, correct?

20 A As of, at that time, yes.

21 Q Right.

22 Now, it's been your testimony that on May 30th
23 you concluded your case, correct?

24 A Is it 30th or 31st, whatever date.

25 Q You stated that the 31st was the Friday, so 30th was

1 the conclusion?

2 A That's correct.

3 Q And it was at that point, that your office was able to
4 come up with new contact information on Ms. Knight, correct?

5 A Yes.

6 Q And on the 31st of May, you went out with -- you
7 asked two detectives to go with you to the Bronx to find this
8 witness, correct?

9 A That's correct.

10 Q And that would be Detectives Cooper and Besell,
11 correct?

12 A Okay. Uh-huh.

13 Q So, you went to the new residence information, in the
14 Bronx, for Ms. Knight, correct?

15 A Yes.

16 Q And that's when you said a young child told you that
17 she was not home?

18 A Yes.

19 Q So you had her address?

20 A Yes.

21 Q Did you have her phone number at that point in time?

22 A No.

23 Q He told you where she worked, correct?

24 A Who?

25 Q The son?

1 A He couldn't recall. He, all he did say was that she
2 work in some towers that is in the Bronx.

3 Q And it was the detectives who knew that the towers
4 meant Regency Towers in the Bronx?

5 A That's correct, that's correct.

6 Q So off the three of you went to the Regency Towers to
7 speak with Ms. Knight?

8 A Yes.

9 Q You found her there?

10 A That's correct.

11 Q And she was working as a security person at Regency
12 Towers?

13 A That's correct.

14 Q So now you had her home address and her place of
15 business?

16 A Uh-huh.

17 Q She agreed to sit down with you, correct?

18 A Yes.

19 Q And she gave you her home number, correct?

20 A That's correct.

21 Q And you had her business, number two, correct?

22 A That's correct.

23 Q You probably met with her for about an hour?

24 A I don't recall how long we stayed, but it wasn't an
25 extensive interview. She was at work, so we didn't belabor

1 that.

2 Q And it's your position that she reiterated what her
3 five said, DD-5?

4 A I didn't, I mean most of the questions was done by the
5 detectives on it but --

6 Q You were there?

7 A But I was present and I heard her responses.

8 Q And that was Friday the 31st?

9 A That's correct.

10 Q And you left there, so now, as of that date, you that
11 her home address, her home phone number, her place of business,
12 her place of business' phone number, correct?

13 A Uh-huh.

14 Q And you went back to court on June 3rd, 2003?

15 A Uh-huh.

16 Q And it's your testimony that Stanley Gaskin then
17 basically, you know, severely hurt Mr. Hanley's testimony by
18 contradicting it, correct?

19 A Correct.

20 Q He now, Mr. Hanley, had told you he was outside, he
21 witnessed the shooting. Now Mr. Gaskin says he was inside. He
22 was nowhere near the shooting. And you have a one-witness
23 homicide where the witness has been a little beaten up, right?

24 A Okay.

25 Q So, at that point, you said that you called Ms.

1 Knight, because now it was important to you, to put her on the
2 stand, correct?

3 A That's correct.

4 Q Did you send those detectives out to her home?

5 A I actually asked the detective that night, I gave them
6 two names. It was Kameesha Grant and her, and I did in fact
7 indicate to them that I would continue to try to reach out to
8 Ms. Knight, and also trying to find additional information
9 about Ms. Grant.

10 I don't know exactly what they were doing. This
11 was the night shift. There was only one detective working.

12 Q Which detective did you speak to?

13 A Detective Cooper.

14 Q What I asked you though, Mr. Stuart, did you tell
15 Detective Cooper to go out and look for Ms. Knight? Did you
16 send Detective Cooper to her home or her place of business?

17 A I did not send Mr. Cooper to her home or place of
18 business. I gave him a subpoena and he said that he will, he
19 would look into it because there were two people I was
20 concerned about.

21 Q Subpoena for Ms. Grant or Ms. Knight?

22 A I think we may have ran both at that point. I'm not
23 too certain, whether or not it was for both.

24 But my determination at that point, that since I
25 have Ms. Grant's phone number, and this was 7 p.m. at night,

1 she was the only person working in my trial bureau, and he had
2 other things that he was doing that night, to at minimum at
3 least try to stop by the address we had for Kameesha Grant.
4 They were basically in the same vicinity. He knew about
5 Kameesha Grant. He knew about Ms. Knight's address. I do not
6 know whether or not he was going to do that or not, but my
7 emphasis was that he also check out Ms. -- the address that we
8 had for Kameesha Grant at that point.

9 Q Do you recall being asked on September 16, 2003 and
10 giving this answer, page 52. "Ms. Kornberg: Well, did you
11 send anyone to her home, any of your two investigators to her
12 home or to her place of business to see if she was there in
13 that course of 24 hours that you tried to contact her by phone?

14 "Mr. Stuart: No, the answer is no."

15 You never mentioned subpoenaing her at that time?

16 A I'm not certain. I'm not certain. I'm not certain
17 whether or not there was a subpoena for her, all right, but I
18 was concerned.

19 Q You subpoenaed Ms. Grant, though, that you know?

20 A That much I know that that we printed out because my
21 thing was, when we left Ms. Shanice Knight there was no
22 animosity or anything between us.

23 And it was a time factor, they came looking for
24 two people.

25 Q There were two detectives, Mr. Stuart, and you have

1 more resources than those two. This was a woman who was
2 essential to, you knew for a fact you had never heard of Ms.
3 Grant before, but you knew from sitting down four days earlier
4 with Ms. Knight that at that time she would have corroborated
5 Mr. Hanley's story, and been a witness that would have
6 discredited Mr. Gaskin; is that correct?

7 A Yes, uh-huh.

8 Q So she was a sure thing as far as her testimony at
9 that time, in your opinion?

10 A At that time, yes, but also based on my own experience
11 I also strongly felt that she was trying to avoid me.

12 Q Based on your few phone calls to her that was the
13 avoidance?

14 A Oh sure, yes.

15 Q But you didn't send anyone to her home or to her place
16 of business?

17 A I did not directly send anyone to her home or place of
18 business.

19 Q Isn't it a fact that two months later when she
20 ultimately testified for the defense, because she changed her
21 whole story and was actually corroborating Mr. Gaskin, that she
22 was working at the Regency Tower just where you had left her?

23 A I don't know.

24 Q You don't know that she was working there?

25 Okay. There are several things in that question.

1 A If she was still working there?

2 Q Yeah, she hadn't left there.

3 A No, I never said she left. I said at the time I was
4 trying to locate her, she was not there. I never said she
5 left. I have a pretty good idea of how that program works as
6 far as being on welfare or sustenance. They have to have
7 sometimes some type of employment. So that would be
8 endangering her employment but at the time I tried to reach out
9 to her, nobody knew where she was or whether she was coming
10 back.

11 Q So the next day in court you called Ms. Grant because
12 you had subpoenaed her?

13 A I called Ms. Grant because -- okay, I called Ms.
14 Grant. We had a subpoena from Ms. Grant. I don't think the
15 subpoena was served upon Ms. Grant until she was actually in my
16 office. She voluntarily came to my office with the two
17 detectives.

18 Q Okay. She testifies, and her testimony disputes Mr.
19 Gaskin's testimony?

20 A That's correct.

21 Q The defense witness.

22 But in the course of her testimony, she mentions
23 that she just spoke to Shanice Knight like two or three weeks
24 ago, correct?

25 A Yes, I remember that.

1 Q And that is when this entire Brady issue gets
2 revisited, correct, because the defense felt this is your
3 witness, you put her on, she knows where Shanice Knight is,
4 prosecution must know where Shanice Knight is, correct?

5 A The issue got revisited.

6 Q And that was the reason, right, because Ms. Grant
7 brought up Ms. Knight's name? It wouldn't have been revisited
8 if Ms. Knight's name hadn't been spoken, would it?

9 A I don't know. I don't know, counsel.

10 Q Well, it was revisited at that time?

11 A It was revisited after the testimony of Ms. Grant.

12 Q Right. And I'll direct your attention to -- one
13 moment.

14 So I'm sorry, withdrawn.

15 So Ms. Grant testifies. And, like I said, she
16 mentioned Shanice Knight.

17 And the defense counsel raises again the issue of
18 where is this witness, correct?

19 A Yes.

20 Q And at that point, on page 26, of July 4th, 2002's
21 transcript, the Court says to you: "Do you have knowledge, you
22 indicated earlier during the course of the trial that you did
23 not have any knowledge of Ms. Shanice night's whereabouts?

24 "Mr. Stuart: That's correct, Judge, that's
25 correct."

1 And is that still your position? The Court asks
2 and you state: "Yes, Judge."

3 A Uh-huh.

4 Q Now a month earlier when they asked you, the direct
5 quote was, "has anyone been in contact with the witness?" You
6 didn't say yes or no.

7 MR. KARP: Objection as being repetitive. It's
8 the same thing again.

9 MS. BRODER: I'm formulating a question.

10 SPECIAL REFEREE: We'll allow it.

11 Q You went into a large narrative, but on June 4th, four
12 days after you just had a sit-down with the witness that
13 defense counsel is constantly arguing is a Brady violation, and
14 you simply say, "Yes, Judge. Correct? The Witness: Yes."

15 A Yes.

16 Q And again, later Ms. Knight submits an affidavit later
17 basically saying that she witnessed the shooting in this
18 matter, and becomes a defense witness in the second trial,
19 correct?

20 A I don't know what evidence is used in the second
21 trial.

22 Q You don't know, is it your position as you sit here
23 today, that you didn't know that Ms. Shanice Knight changed her
24 story?

25 A Of course we did, because there was a motion that was

1 filed.

2 Q And that's when it came to light with your officers
3 that you had made this misrepresentation to the Court, that you
4 had actually sat down with the witness when the judge asked you
5 if you had any knowledge, and basically said no, that you did
6 have knowledge, correct?

7 That's how it came to light because Ms. Knight
8 said she had spoken to you?

9 A It came to light after the motion was filed.

10 Q Right. And in that motion, Ms. Knight said, I told
11 this to Mr. Stuart, and the detectives. I met with them.

12 Correct?

13 A Okay. I mean, as you indicated there was an affidavit
14 or something to that fact.

15 Q My point is, as a prosecutor and an officer of the
16 Court?

17 A Uh-huh.

18 Q How do you reconcile your answer to a judge when you
19 know everybody -- you say this was an unintentional statement
20 in that you should have answered differently, but, everybody
21 was concerned about a Brady violation, and you just thought
22 that the Court wasn't interested in the fact that a missing
23 witness you had spent four days earlier with?

24 A What do you mean, everybody was concerned about the
25 Brady violation? The judge had ruled that unless he heard

1 other evidence in this case, I mean, then he would reopen the
2 Brady issue.

3 Q And he did?

4 A But where she was concerned -- where he was concerned,
5 his decision was based on the DD-5, which he had an opportunity
6 to review, and any other statements or representations that
7 either myself or defense counsel had made on the record at that
8 point in time.

9 You know, and where it's concerned he heard
10 additional argument in reference to this issue, but I mean the
11 issue wasn't open for any other colloquy or decision by the
12 Court.

13 Q Well, Mr. Stuart, the record is, basically the record
14 disagrees with you because here the whole Brady issue is
15 revisited. The judge decided to re-hear the argument because
16 Ms. Grant brought up Ms. Knight's name at this point. It's in
17 evidence the transcript speaks for itself?

18 A That's correct.

19 Q You state --

20 MR. KARP: Page number?

21 Q Looking at page 26 through, everything that follows.

22 At that point they ask you: "You indicated
23 earlier you didn't have any knowledge of her whereabouts?

24 "That's correct."

25 "Is that still your position?"

1 "Yes."

2 The Court says, "I believe your application Mr.
3 Brenner is for the District Attorney to provide you with
4 information as to the whereabouts of Ms. Shanice Knight?"

5 A That's correct.

6 Q Mr. Brenner goes on to say, "yes, your Honor. We have
7 a witness that, who the Prosecution called, who she said he
8 spoke to Ms. Knight two weeks ago," and he goes on to argue
9 that, as the prosecutor, you should know where she is, and
10 ultimately you speak again. Do you?

11 A Is that before I made a statement or after?

12 Q After.

13 Again, you haven't raised the fact -- "I think in
14 the interests of the earlier statement where you were very
15 verbose about the efforts you had gone to, to find Ms. Knight
16 that were futile, here we had a situation where you chose to
17 say nothing," and at that point in time did you say, "Judge,
18 actually three days ago I learned where she was. We sat down
19 and we interviewed her. These are the names of the people I
20 was with. Here's the numbers. She's here: Her work address,
21 her home address, her home number, but as of last night I
22 repeatedly called her, and it is the position of the People
23 that she is a lost witness again, because unfortunately in the
24 nature of homicide trials, that's what happens to witnesses you
25 don't have a material witness for, they fly."

1 Right?

2 A Right.

3 Q You didn't say that, though?

4 A No, I didn't. And I think I mentioned that I didn't
5 say that.

6 Q And also later you go on to again reargue that she's
7 not Brady, correct?

8 A I mean I don't have -- is that what?

9 MR. KARP: Where are you reading from, or are you
10 reading?

11 MS. BRODER: One second.

12 Q Page 28, bottom. "Judge, the People's position is
13 exactly that the, that this was not Brady material and counsel
14 certainly had the option of pursuing and locating this
15 individual, chose not to, and instead chose to present Mr.
16 Gaskin instead of this witness, and that's the People's
17 position."

18 And you go on to say, "it is not my obligation
19 now to try to locate any witness on behalf of the defense at
20 this juncture."

21 Again, at that point in time you didn't tell them
22 you had just met with his witness four days ago, that you did
23 locate her?

24 A No.

25 Q No.

1 MS. BRODER: One moment.

2 (Pause in proceedings).

3 Q You spoke, the issue came up before of the People
4 versus Jay Walters, correct?

5 A Uh-huh, yes.

6 Q And in that case, the Appellate Division, Second
7 Department, found that you had engaged in prosecutorial
8 misconduct; is that correct?

9 A That's correct.

10 Q And one of the reasons -- one of the things that it
11 claimed was the most egregious was your insinuation was that
12 the gun which had been recovered from the defendant two weeks
13 after the crime in an unrelated arrest may have been the gun
14 used to shoot the victim?

15 A That's correct.

16 Q And you persisted with this implication despite your
17 knowledge that the ballistics tests performed by the police
18 conclusively established that the gun had not been used in that
19 crime, correct?

20 A That's what the decision said.

21 Q Was the Court wrong in its decision?

22 A I'm not -- I'm not saying that the Court was wrong
23 with any decision. I'm explaining to you that the ballistic
24 report indicated that it was consistent with. And that is
25 the -- I mean, and the words that I used is that it was -- it

1 "could have been." I think the exact words I used in my
2 summation is it "could have been" the same weapon.

3 Q Yeah?

4 A But, to say that it was totally not the weapon, that's
5 not what I was relying upon despite what the decision in the
6 case.

7 Q The Appellate Division found, though, that your
8 conduct in advocating a position which you knew to be false and
9 they found that you knew that that position was false was an
10 abrogation of your responsibility as a prosecutor.

11 Was that the only finding of misconduct in that
12 decision?

13 A I don't think I understand the question.

14 Q Was that the only finding of prosecutorial misconduct
15 in that decision?

16 A You mean other cases?

17 Q No, in that particular case were there other factors
18 that the Court found that you engaged in prosecutorial
19 misconduct?

20 A I think the Court cited, as I recall, that I, how I
21 was describing the defendant in the case, I think I made
22 statements to the effect that he left the victim to die like a
23 dog on the street. There were comments that.

24 Q Considered inflammatory?

25 A That they considered inflammatory, that they used as

1 well to overturn the case, yes.

2 Q And also that you shifted the burden of proof to the
3 defendant?

4 A Well, that's what they indicated in the decision.
5 That as a result of my comment, that caused the burden to be
6 shifted.

7 Q And didn't they also find that you gave your own
8 opinion regarding truth and falsity of a witness' testimony?

9 A If that's what's in the -- as prosecutors we always
10 comment about, you know.

11 Q As prosecutor, do you always comment about the truth
12 and falsity of a witness's testimony?

13 A I mean, it all depends on what words you use, but
14 there are many times we comment about whether the person is
15 worthy of belief or not worthy of belief.

16 Q Actually, Mr. Stuart, that is grounds for reversal;
17 that's prosecutorial misconduct.

18 A And I'm not disagreeing. I'm saying that that was one
19 of those cases in which I had tried, and where those comments
20 were made, and I have learned from those mistakes. I mean,
21 it's --

22 Q This wasn't the only body that commented on your
23 conduct in this case, correct?

24 A Are you talking about, because that part of the case
25 was then, I think we had a defense attorney who had attached

1 that decision to certain allegations, and had forwarded --

2 Q No, I'm sorry, I'm referring to the fact, isn't it
3 true that you were cautioned by the grievance committee in the
4 ninth district for your comments; didn't you receive a letter
5 of caution?

6 A I received a letter of caution as a result of the
7 complaint filed by a defense attorney. It wasn't as a result
8 of this decision being referred to the grievance committee.

9 Q Well, how it got to the grievance committee isn't my
10 question. My question is, isn't it true that the grievance
11 committee found that during the course of the trial of the
12 People versus Walters that you engaged in prosecutorial
13 misconduct?

14 A Well, yes. That's what was in the letter of caution.
15 I recall that's what was in the letter of caution.

16 Q And I'm just going to show you this letter of caution.
17 Is this the letter of caution that you received?

18 (Handing).

19 A Okay.

20 MR. KARP: At this time I would like to move the
21 caution into evidence as Petitioner's Exhibit 7.

22 MR. KARP: Ordinarily, Mr. Clark, these things
23 are never put in evidence because they're something --
24 they're not probative of the case on trial.

25 Since the thing has been mentioned all over the

1 place, it might just as well go in.

2 SPECIAL REFEREE: I think we're going to have to.

3 Let me ask you a question.

4 How did the ninth judicial district get involved?

5 MS. BRODER: Typically because Mr. Stuart was a
6 prosecutor for the Queens District Attorney's office at the
7 time, I believe at the time it was sent to the ninth
8 because we often work with prosecutors in Queens.

9 SPECIAL REFEREE: Possible conflict.

10 MR. KARP: Based on what's been said but I'm
11 that's probably correct, that's why it was referred.

12 SPECIAL REFEREE: We'll mark that as Petitioner's
13 Exhibit 7.

14 (Letter of caution so marked as Petitioner's
15 Exhibit 7 in evidence.)

16 MS. BRODER: I have no further questions.

17 SPECIAL REFEREE: Do you have anything else, Mr.
18 Karp?

19 MR. KARP: I have, yes.

20 REDIRECT EXAMINATION

21 BY MR. KARP:

22 Q Mr. Stuart, you were asked before if the case of
23 Tyrone Johnson was retried.

24 Do you recall that?

25 A Yes.

1 Q And you are aware of the fact that it was retried; is
2 that correct?

3 A That's correct.

4 Q And you are aware of the fact that Shanice Knight did
5 testify at that retrial?

6 A That's correct.

7 Q And that she changed her testimony?

8 A That's correct.

9 Q Or at least not her testimony, but changed her story
10 from what she had originally told the detectives and yourself
11 and on the DD-5; is that correct?

12 A That's correct.

13 Q And despite that he was convicted of the murder; is
14 that right?

15 A That's correct.

16 MR. KARP: I have no other questions.

17 MS. BRODER: Actually two more questions.

18 RECROSS EXAMINATION

19 BY MS. BRODER:

20 Q As you stated, Ms. Knight testified on behalf of the
21 defense and changed her story from what was initially on that
22 DD-5, correct?

23 A Initially was on the DD-5, was told to us on May 30th,
24 2002.

25 Q Right. But then she recanted that, and testified on

1 behalf of the defense?

2 A Yes, she testified on behalf of the defense.

3 Q Mr. Stuart, you heard one of the witnesses you called
4 as a character witness. I believe it was Reverend Beach. He
5 referred to the fact that this instance with Tyrone Johnson and
6 the investigation that occurred at the D.A.'s office after the
7 misrepresentation was what he called "a setup "?

8 MR. KARP: That's not his testimony. He said
9 that was what was said. He didn't say it was him who said
10 it.

11 SPECIAL REFEREE: That was in the opinion?

12 MR. KARP: That was the opinion.

13 MS. BRODER: He's a character witness talking
14 about opinions, and said it was the opinion of people that
15 this was a setup.

16 Q As you sit here today, do you think this was a setup?

17 A I beg your pardon?

18 Q Do you think that this was a setup?

19 A I mean, I have no opinion one way or the other. I
20 mean, this is what occurred. I mean, I, this is an opportunity
21 that, probably the only opportunity I had to apologize for my
22 actions. And I sincerely regret what occurred on June 4th,
23 2002 in front of Justice Rios.

24 Q You heard what Mr. Lawrence, Mortimer Lawrence, said
25 when he sat here today, correct?

1 A Yes.

2 Q He talked about, as a prosecutor, there's a pressure
3 to "push" the evidence; do you remember him saying that?

4 A Yes.

5 Q Do you agree with that?

6 A In certain cases that's -- those things are practiced.

7 Q Did anyone pressure you to tell the Court that, you
8 know, that despite meeting this witness four days earlier, that
9 you had no knowledge of her whereabouts?

10 A Beg your pardon?

11 Q Did anyone pressure you to say to the Court, that you
12 didn't know where this witness is even though four days earlier
13 you met with her?

14 A Nobody pressured me to say anything one way or the
15 other.

16 As I indicated, I made that statement based on
17 the fact that I could not locate her at that time, and I
18 honestly believed that she was trying to avoid me or make
19 herself unavailable at that point in time.

20 Q And that was based on the few phone calls you made?

21 A That was based on the few phone calls, plus my
22 experience as a trial prosecutor in a homicide division of how
23 witnesses appear and disappear frequently, because they're
24 trying not to -- trying to avoid testifying in any particular
25 action.

1 Q What would your opinion be of, had defense counsel
2 made such a misrepresentation to the Court about, on a matter
3 that you were prosecuting? If, hypothetically if you were on
4 trial, and a defense counsel made a misrepresentation to the
5 Court concerning potential Brady information, do you think that
6 would be egregious?

7 MR. KARP: Object to the form of the question and
8 to the question itself.

9 SPECIAL REFEREE: I don't know where that
10 question brings us.

11 MS. BRODER: I have nothing further.

12 MR. KARP: I have nothing else.

13 SPECIAL REFEREE: Thank you.

14 (Witness withdrew.)

15 MR. KARP: Before you make your statement, I have
16 two letters, copies of which I gave to Ms. Broder earlier.

17 MS. BRODER: Today.

18 MR. KARP: That's earlier, isn't it?

19 I have originals. One is from Justice Dwayne
20 Hart, Queens County, and from Justice Daniel Lewis, Supreme
21 Court, Queens County, and they have been subpoenaed to
22 testify, and they reflect that in their letter and they
23 give a letter of character which I would like to offer as
24 Respondent's A and B, I guess.

25 MS. BRODER: I don't have an objection to the

1 submission of the two letters.

2 I do object to the content that it be limited to
3 purely his reputation in the community for truth and
4 veracity, and no other background information.

5 SPECIAL REFEREE: Fine. I think we can take it
6 and certainly apply the cross-examination that you may have
7 to character witnesses into consideration.

8 MR. KARP: If the reporter will mark them A and
9 B.

10 (Letters of character so marked in evidence as
11 Respondent's A & B, respectively.)

12 Q In addition to that, there was another witness
13 probably two, but obviously couldn't make it. I would ask for
14 some time to submit letters from them. I will give copies to
15 Ms. Broder.

16 SPECIAL REFEREE: First, it will be a while
17 before I get the transcript. I don't see that as a
18 problem. And I would accept them in the same vein as I
19 accepted these. Is there anything counsel wants?

20 Do you want to submit a memorandum or do you want
21 to make a statement?

22 MR. KARP: Perhaps both.

23 SPECIAL REFEREE: Anything.

24 MR. KARP: I would probably like to submit a
25 memorandum if Ms. Broder intends to do it. We'll agree

1 upon that, subject to your approval.

2 SPECIAL REFEREE: Sure, sure.

3 MR. KARP: I would merely state that recognizing
4 that strange things happen during trials, sometimes we win
5 the case we were supposed to lose; and sometimes we lose
6 the case we are supposed do win.

7 If you try enough cases you are going to
8 experience those two opposite ends. And a lot of things
9 happen during the heat of a trial, particularly when it's a
10 contentious trial. And I think any examination of the
11 record here, even in part, would indicate that it was
12 probably very contentious, and understandably so, it's a
13 murder trial, and as defense lawyers who make a big
14 hullabaloo, we didn't get Brady material, the world has
15 now come to an end, to some extent that may be correct, but
16 the judge did rule based on the information that he had
17 that it was not Brady. I'm not sure that that's the issue
18 here. I think the issue here is a simple issue: When Mr.
19 Stuart addressed the Court in response to a question on
20 June, whatever day it was, I keep forgetting, the second
21 time, when he was asked the question about if he knew,
22 generally speaking, of the whereabouts of Shanice Knight
23 and sort of reiterated his original statement that he
24 didn't, and he has indicated that he not only erred in
25 judgment, but it was wrong to do it, that had he acted

1 properly, if he was not under the pressure, possibly, that
2 he was in the heat of the moment, and the case being such
3 as it is, bearing in mind that the fellow on trial here was
4 on trial here for a very, very heinous crime, actually he
5 and his cohort, whoever that was, and actually got a third
6 person who obviously knew the victim to sort of lay there
7 and wait for him, and to let him know or let them know when
8 this poor guy -- I say "poor" because I don't know what
9 kind of guy he was, I have some reservations about it, but
10 he did die. And this guy showed up, and twice he called
11 him, and they got there too late.

12 So they went in, they gave him a walkie-talkie so
13 they could get an immediate thing, wouldn't even have to
14 bother dialing a telephone, and got there rather quickly,
15 and it resulted in his death. So it was a rather heinous
16 crime, one that the county was interested in. I don't know
17 how much newspaper publicity it got, but I suspect that it
18 did. And Mr. Stuart was given the job of prosecuting the
19 case, although he was not the original prosecutor.

20 And I think all the factors being taken into
21 consideration, and especially the fact that he says, look,
22 I made a mistake, I did the wrong thing, I should have told
23 the judge. Not only do I not know where she is at the
24 moment, because I tried to call her, but I did talk to her
25 four days ago and she reiterated what she had said on the

1 DD-5.

2 If anything, I would rather use her as my
3 witness. And I think the defense would want to use her as
4 their witness.

5 I dare say, the defense had ideas of its own not
6 based upon what the lawyer would do but apparently upon
7 what the friends of Mr. Defendant Tyrone Johnson would do.
8 And obviously did get to her to change her testimony at a
9 subsequent trial which I have to think was discredited by
10 the evidence and the information they did have. And it
11 resulted not in the acquittal of the man, but his
12 conviction a second time. And as far as I know he's doing
13 a sentence of life, something to life, 20 or 25 to life.

14 MS. BRODER: Objection. I'm just going to object
15 to what the sentence was.

16 SPECIAL REFEREE: Whatever.

17 MR. KARP: We know that's the sentences they give
18 out. Certainly weren't going to give him a merit badge for
19 what he did, for killing a guy in the cold-blooded fashion
20 in which he did. And, so, I think it becomes maybe not
21 acceptable in the final sense but understandable. I'm not
22 saying that we should say to this fellow, deserves a medal
23 for what he did, what he failed to do. I'm saying we
24 should try to understand what happened.

25 And this is why I was anxious to present to you

1 all of the surrounding circumstances so you would
2 understand perhaps what we're talking about. We're talking
3 about a human being. We're talking about his life. And
4 you had the ability to meet his wife and you know he has a
5 family, and what his education was.

6 And the only negative that was raised it seems to
7 me in this case about his former background was the case,
8 the '98 case where the Appellate Division decided the way
9 they did, but the grievance committee only sought fit to
10 give him a letter of caution. To my way of thinking, a
11 letter of caution is really, you didn't do anything
12 terrible or wrong, but be careful because it may border on
13 that situation. And I think maybe the grievance committee
14 was more clever than the Appellate Division. I don't know.

15 God knows, Appellate Divisions and courts make
16 mistakes just like committees sometimes do. And I think
17 that case, and he said he learned from that case. That
18 there are comments that you can't make.

19 Now, as far as commenting upon the veracity of a
20 witness, I've done it and other lawyers have done it. We
21 don't say he's a liar, or "in my opinion he lied" but
22 certainly we're within the rules when we say based upon
23 what he told you he's lying to you, based upon that, and
24 point out what the facts are that cause that conclusion.

25 "But it's your decision, ladies and gentlemen of

1 the jury, to decide the credibility of the witness. And
2 the Court will give you the guidelines to apply to that."
3 I don't think there's anything wrong with that. Yeah, you
4 can go overboard. And I have seen prosecutors go
5 overboard, and they're corrected, and nobody gets too upset
6 about it.

7 As far as the gun situation, the ballistics
8 report which was never here so I haven't seen it, but I
9 believe that the bullet that was extracted from the body
10 was a fragment of a --

11 MS. BRODER: I am going to object.

12 MR. KARP: He said it was a fragment.

13 MS. BRODER: Again, I objected to the testimony
14 at the time because we don't have the ballistic reports,
15 we're relying on the decision of the Appellate Division
16 which is the law basically.

17 MR. KARP: I'm relying on his testimony.

18 SPECIAL REFEREE: Mr. Karp is not testifying.
19 And I'm taking what he has to say as an advocate.

20 MR. KARP: And I know from experience that a
21 fragment frequently doesn't give you enough to give a
22 ballistics report.

23 I know I tried a case once where a bullet was
24 extracted from a body and the medical examiner testified
25 about it because there were powder burns, or lack of powder

1 burns, to prove that the defendant was lying when he said
2 they were up against one another when the gun went off, and
3 merely asked him one question: Could that projectile have
4 been fired or expelled by a gas gun or a CO-2 gun, and he
5 said yes, that doesn't leave a powder; and he said yes.

6 So the ballistic report frequently shows that a
7 fragment of a bullet doesn't give you the answer
8 positively. And he said he wouldn't use it. He didn't use
9 the gun in evidence, because he wasn't convinced it was
10 used, positively, but after defense counsel raised the
11 issue of the gun being produced, he said I didn't produce
12 the gun or it's consistent, or like the gun, or the same
13 type of gun that was used to kill this man.

14 They knew it was a .38. They could tell that, I
15 suppose, by some forensic evidence.

16 SPECIAL REFEREE: That's just background anyway.

17 MR. KARP: Yes?

18 SPECIAL REFEREE: I understand. The Appellate
19 Division found one way, but that's not the key. That's
20 really a question --

21 MR. KARP: Appellate Division and I disagree
22 often frequently.

23 SPECIAL REFEREE: Actually, that got into
24 evidence based on reputation, so it's okay.

25 MR. KARP: Then I didn't even object to the

1 letter.

2 SPECIAL REFEREE: I'm not going to spend a lot of
3 time on that, frankly.

4 MR. KARP: I think the case really rests upon
5 that narrow, narrow issue. And I think that's what it is.
6 And I submit to you that I think he's explained it in a way
7 that's understandable, and something we can accept, and I
8 trust that you will accept that.

9 SPECIAL REFEREE: Okay.

10 MR. KARP: Not as an absolute defense, but in
11 mitigation of what occurred because what happened,
12 happened; I can't change the events any more than any one
13 of us can, but based upon what we've heard and seen as to
14 what mitigates the act.

15 MS. BRODER: Just because a crime is heinous
16 doesn't give a prosecutor the right to choose what a judge
17 should know, and what a judge shouldn't know. And that's
18 what Mr. Stuart decided to do. He is and was a seasoned
19 prosecutor, who had tried 70 cases, and this wasn't just a
20 mistake where he thought that the judge meant that "it's
21 10:56, do you know where this witness is," at this point in
22 time, because until we sat here today, that has been his
23 position from his answer, which is in evidence, to his
24 investigative appearance testimony.

25 The reality is, is that he had a one-witness

1 homicide, and this witness was out there, and she had
2 become a potential Brady problem for the Prosecution, and
3 the bottom line is, Brady, not Brady, heinous crime, how he
4 was killed really not important. What's important is the
5 judge asks you a question and when the judge says, do you
6 have any knowledge about something, and you basically say
7 no. And your position was you had no knowledge a month
8 earlier and a month later, everything had changed, she was
9 no longer someone you couldn't locate; she was someone you
10 had actually sat down with, met with, had contact
11 information with, and the defense had made her a very big
12 issue. And whether Mr. Stuart wants to acknowledge it or
13 not, it was ultimately going to be the judge's decision as
14 to whether there was any Brady violation. And while he may
15 have initially said that she wasn't Brady, it was based on
16 relying on Mr. Stuart's representation as an officer of the
17 Court that this witness was a lost witness. And when it
18 was revisited again that the Prosecution might have had
19 information about her, because the witness they put on the
20 stand knew where she was two weeks ago, he chose to conceal
21 that information from the Court, and simply say that his
22 position hadn't changed.

23 That was a flat-out lie, a major
24 misrepresentation. And when we talk about the stakes a
25 heinous crime, whether we like the defendant or not, he was

1 on trial for his life, too, and as a prosecutor he has a
2 duty to completely be an ethical officer of the Court, and
3 to turn over information that was relevant to the judge at
4 that point in time. And it would be unreasonable to
5 believe that a prosecutor with the amount of experience and
6 the savvy that Mr. Stuart had would have even remotely
7 thought that the judge wasn't interested that four days
8 earlier he had learned all this information about the
9 witness.

10 Now, yes, she ultimately comes forward and she
11 changes her story. Would she have done that earlier?
12 We'll never know. She could have corroborated her initial
13 five or not, but that wasn't Mr. Stuart's choice to make,
14 he doesn't decide what's important or not, the Court does.
15 And the only way the Court can decide is when the officers
16 of the court are honest.

17 When the matter came up about the People versus
18 Jay Walters, it's the petitioner's belief that this goes to
19 the heart of his credibility as an attorney, and also what
20 his state of mind was when he made that statement to the
21 Court. He has previously advocated a false position to the
22 Court. The Appellate Division has found so. He has been
23 sanctioned by the ninth district for vouching for a
24 witness, which is a violation of the disciplinary rules,
25 whether it's practiced or not, it's a violation. And based

1 on his history, and his experience and everything that
2 transpired, and the importance of that information, it's
3 the petitioner's position that this was an intentional
4 misrepresentation to the Court to conceal information
5 regarding a witness's location.

6 SPECIAL REFEREE: Okay. Thank you.

7 MR. KARP: Do you want to fix some sort of a
8 date?

9 MS. BRODER: How many weeks?

10 SPECIAL REFEREE: Well, the transcripts won't be
11 in for about 30 days I would assume.

12 MS. BRODER: Usually faster than that.

13 MS. BRODER: I would ask we set a date whereby
14 Mr. Karp has to provide me with these character letters or
15 he can't submit them. So within the next?

16 MR. KARP: Whatever date you say; if I'm late, I
17 am going to ask you to change it.

18 SPECIAL REFEREE: Why don't we, for the character
19 letters, make it two weeks.

20 MR. KARP: That's fine.

21 MS. BRODER: Then when do you want papers.

22 SPECIAL REFEREE: Do you need the transcript in
23 order to do a memorandum or do you want to do a memorandum?
24 I think the memorandum should be focused really on the
25 intentional or nonintentional aspects.

1 MR. KARP: I'm not positive. I'm not positive we
2 need the transcript, but we may.

3 MS. BRODER: I like personally to have the
4 transcript by usually.

5 SPECIAL REFEREE: Why don't we say two weeks
6 after the transcript?

7 Is that enough time?

8 MS. BRODER: Okay.

9 MR. KARP: I think it's not enough time because
10 of summertime. I would say 30 days.

11 MS. BRODER: So what date is that?

12 MR. KARP: You are going to be away part of the
13 time?

14 MS. BRODER: No.

15 MS. BRODER: Why don't we just set a date now.

16 SPECIAL REFEREE: How about September 15th.

17 MS. BRODER: That's a Wednesday.

18 SPECIAL REFEREE: Is that all right?

19 MR. KARP: Yes, it is.

20 * * *

21 It is hereby certified that the foregoing is a true and
22 accurate transcript of the proceedings.

23 
24 -----
25 ELLEN DOHERTY NERI CSR, RPR, CRR
PRINCIPAL COURT REPORTER

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